No. 83-24

In The
Supreme Court of the United States
October Term, 1983

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UNITED STATES OF AMERICA,
Petitioner,
vs.
CHARLES TATE, ET AL.,
Respondents.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Counsel has researched and prepared this brief *gratis*. It is filed expressly on behalf of the three named respondents and counsel has been told that the two other respondents join in the brief. Counsel has also paid for the printing of the brief out of his own pocket and given the fact that the Court requested a single brief for all five respondents hopes that this form is satisfactory rather than having to go to the expense of preparing several briefs, placing different portions of the material in each one and suffering a far greater expense. Additionally, the Solicitor General incorporated the sixty-five

page brief filed in *Illinois v. Gates*, requiring a response to the arguments.

STATEMENT

The investigation of this matter commenced on July 12, 1980, and was conducted solely by peace officers of the Tulare County Sheriffs Department and law enforcement personnel of the State of California. The warrants were issued on July 13, 1980, by a state magistrate, the affidavits were by state police and the searches were conducted by state officers. (C.R. 1-a; R.T. line 1, pp. 13-14)[1] The defendants were arraigned in state court and a preliminary hearing had been scheduled in the state court when the federal government became involved and took over the case because of the greater penalties in federal court and less demanding search and seizure requirements. The federal prosecutor telephoned the state prosecutor and told him to dismiss the case. He was going to prosecute it. (R.T. V.I, pp. 17-20; 97-102; pp. 2-9)

In the affidavit in support of the search warrant commanding the search of the premises located at 5580 Avenue 320[2] (hereinafter referred to as Avenue 320

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[1]R.T. V.I, refers to the defendants' Motion to Suppress hearing on September 24, 1980; R.T. V.II, refers to defendants' Motion to Suppress hearing on December 8, 1980; and R.T. V.III, refers to the probation report and judgment on March 23, 1981.

[2]The actual address searched was 5530 Avenue 320 (hereinafter referred to as "the Avenue 320 residence").

search warrant), Larry W. McLaughlin, a peace officer of the Tulare County Sheriffs Department, stated that on or about July 12, 1980, he received information from an anonymous informant that said informant observed three to four black male individuals at the Avenue 320 residence, who were utilizing a white Dodge van in and about said premises and that the informant could smell a very strong odor "such as" ether coming from said residence.[3] The informant told Officer McLaughlin that he was familiar with the smell of ether because the informant used it continuously on numerous occasions for the purpose of starting engines. (C.R. 1-a: 2) The informant further supplied McLaughlin with directions to locate said residence.

Officer McLaughlin stated in his affidavit that he personally observed the Avenue 320 residence and found the residence located and as described by the informant. Officer McLaughlin's affidavit further recites the following:

> "Your affiant further states that within the past day your affiant together with Detective Richard Holguin went to the immediate area of said residence and smelled a very strong odor of ether coming from said residence." (C.R.1-a: 2)

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[3]The search warrant commanded the search of the residence located at 5580 Avenue 320, City of Visalia, and to search all rooms, attics, basements and all other parts thereof, the surrounding grounds, garages, storage rooms or out-buildings of any kind, attached or unattached located on the premises. (C.R.1-a: 1) The Avenue 320 residence was comprised of a residence, a shed, a pump house and corrals. The alleged PCP lab was discovered in the shed. The house was located approximately 20 to 30 yards from the road and the shed was located approximately 75 feet from the house and 75 yards from the road adjacent to the residence. (R.T. V.I, pp. 110-111; 131-132)

Officer McLaughlin stated that it had been his experience in the investigation of illicit manufacture of PCP that the process emits a very strong odor of ether.

Based solely on the foregoing facts and information, Officer McLaughlin opined that he had reasonable and probable cause to believe that an unidentified individual (s) is now illegally manufacturing a controlled substance, to wit PCP at the residence and premises located at Avenue 320.

Consequently, the Honorable Robert E. Bradstreet, Judge of the Municipal Court, Visalia Judicial District, State of California issued a search warrant commanding the search of the Avenue 320 residence on the basis of (1) Officer McLaughlin's receipt of information from an anonymous informant that four to five black individuals were at a particular location, (2) that a detectable odor of ether was allegedly emitting from the Avenue 320 residence, and (3) that in Officer McLaughlin's experience he knew the manufacturing process of PCP to emit a strong odor of ether.

Other than the alleged smelling of ether in the vicinity of the premises, there was no other information, observations of unusual activities or other facts adduced during the course of the investigation set forth in the affidavit in support of probable cause that unidentified individual(s) were presently manufacturing PCP at the residence and premises. (R.T. V.I, p. 135)

During the hearing on the Motion to Suppress, it was revealed for the first time that two important facts had not been included in Officer McLaughlin's affidavit. First, the testimony of Officer McLaughlin revealed that he did not stop at the Avenue 320 residence but drove

past the residence twice, such that he was in front of the residence for a couple of seconds in each direction, and at a distance of approximately 225 feet from the shed where the PCP lab was ultimately discovered. (R.T. V.I, pp. 130-134) Second, William G. Miller, of the California Bureau of Narcotics Enforcement, testified that while walking by the residence at approximately 3:30 a.m. of July 13, 1980, (approximately five hours after McLaughlin allegedly noticed the strong odor of ether), he specifically did not detect the odor of ether. He walked within 50 feet of the residence and about 100 yards from the shed. (R.T. 94-96) Based on this testimony, the defendants renewed their Motion to Suppress and pursuant to stipulation and order of court, a hearing was set for December 8, 1980. (C.R. 39)

On December 8, 1980, defendants filed their Supplemental Memorandum of Points and Authorities in Support of their Motion to Suppress Evidence. They alleged that the affidavit in support of the Avenue 320 search warrant was materially false in the following respects:

(1) The affiant did not and could not in fact smell the odor of ether emanating from the residence during the brief passage of time when he rolled down the window for a second or two while he was 75 yards distance from the residence; and

(2) The report of a detection of the odor of ether as set forth in the affidavit in support of the Avenue 320 search warrant was materially at variance with the actual events that occurred as testified to by the affiant at the Motion to Suppress Evidence, which prejudicially misled the issuing magistrate as to the true mode and

manner of the affiant's alleged detection of ether emanating from the premises.

Additionally, the defendants contended that the allegation in the affidavit was made not only with reckless disregard for the truth but in bad faith. (C.R. 41) They made an offer of proof that they had employed Dr. James J. Sims, Professor of Plant Pathology and Chemistry at the University of California, Riverside, California, to conduct experiments to test the plausibility of the truthfulness of the affiant's assertion that he detected the odor of ether from the premises 75 yards distant while passing in an automobile. Dr. Sims' letter, concluding that as a result of his experiments that it was very unlikely that anyone could detect "ether" 75 yards away from a closed shed was attached to the Supplemental Memorandum of Points and Authorities as Exhibit "A". The defendants offered proof of the above experiments and conclusion by the testimony of Dr. Sims at the hearing on December 8, 1980. (C.R. 41: Exhibit "A")

In addition to the foregoing testimony, at the December 8, 1980, hearing, defendants introduced evidence which established that it was highly unlikely that either McLaughlin or Detective Holguin could have detected the odor of ether on the night of July 12, 1980, even if a PCP lab was in progress at the Avenue 320 residence, as follows:

Mark F. Kalchik, a chemist for the Department of Justice, testified that he met Agent Miller, McLaughlin and others at the Avenue 320 residence on the morning of July 13, 1980. (R.T. V.II, pp. 14-15) Mr. Kalchik entered the shed and inventoried the various chemicals listed in his laboratory report. (R.T. 16) Mr. Kalchik testified that

upon his initial approach of the three 5 gallon cans which he later analyzed as containing reagent in ether, he detected an odor that appeared to be piperidine emanating from the three 5 gallon cans only after he unscrewed the cap and smelled the lid. (R.T. 16-18, 20-23) Mr. Kalchik's testimony that the cans containing the ether substance were sealed with screw top lids and were full was previously substantiated by McLaughlin's testimony. (R.T. V.I, p. 136; V.II, pp. 18-20) Mr. Kalchik testified that other than the chemical odor emanating from the top of the table of the drying material, which he described as a combination of odors, there was no odor he could specifically identify as any particular chemical. Further, he could not detect an odor emanating from the three 5 gallon cans until he physically unscrewed the cap and smelled the lid. (R.T. 21-22) Mr. Kalchik stated that there was a distinct difference between the smell of ether and the smell emanating from the table which he identified as associated with the manufacturing of PCP. (R.T. 25) Mr. Kalchik testified that he could not smell any substance that he could identify with ether when he entered the shed. (R.T. 25-26) Mr. Kalchik also testified that a person could not detect the odor of ether when packaged as it was found at the Avenue 320 residence even if that person were to stand "right outside the shed." (R.T. V.II, pp. 29-30)

In addition, both Mr. Kalchik and James J. Sims, Phd. Professor of Chemistry at the University of California at Riverside (R.T. V.II, p. 68), testified that based on the stage in which the PCP was found on the morning of July 13, 1980, ether had not yet been used in the process of manufacturing the PCC into PCP. (R.T. V.II, pp.

28-29, 77) At most, the reagent had been added to the ether as a separate step, which had apparently been completed and the tops of the cans screwed on prior to the manufacture of the PCC. Consequently, very little ether would have evaporated into the atmosphere. (R.T. V.II, 29-30, 78) Mr. Kalchik stated that since ether evaporates quite readily, based on the cans being full and the caps on, it appeared that very little evaporation had taken place. Mr. Kalchik concluded that the reagent in ether had been capped soon after it was made. (R.T. V.II, p. 40) Mr. Kalchik further testified that he believed that little or no ether had evaporated. (R.T. V.II, p. 44) Based on his experience, and given the small evaporation, Mr. Kalchik concluded that it would be unlikely to smell ether from a distance of 75 yards considering it was in a closed shed. (R.T. V.II, p. 45)

Professor Sims testified that it was highly unlikely that a person could smell the odor of ether more than 5 feet away from its source when the person stood out in the open. (R.T. V.II, pp. 70-72) In support of his testimony, Professor Sims related an experiment he had previously run on the smell of ether. During the month of November, on an 80° day in Riverside, and a still day, Professor Sims took 300 milliliters of ether (approximately half of a bottle of wine), put it in a 500 milliliter beaker, put that inside a paper sack and set it out in the back yard. The beaker was an open beaker and the purpose of the bag was to build up a certain concentration of ether by making a larger container for the ether vapor. (R.T. V.II, p. 71) Professor Sims recited that the ether had been placed out for two afternoons on which it was 80° and neither himself nor his two children could smell the ether

until they got within 5 feet of it and many times had to bend over the bag to be able to smell the ether. Professor Sims testified that it is very unlikely, almost impossible, to detect the odor of ether from a distance of 225 feet. (R.T. V.II, p. 72)

Professor Sims testified that ether had 50 to 100 different uses, particularly as a common solvent in organic chemistry. (R.T. 74-75) Professor Sims stated that based on his own personal experience even with boiling ether, you have to get fairly close to it in order to smell it outside. (R.T. V.II, p. 82)

In Mr. Kalchik's opinion, the stage of the manufacturing process at the time the shed was searched at approximately 7:00 a.m. on July 13, 1980, the PCC had been set out to dry and had been there only a couple of hours prior to the search. (R.T. V.II, pp. 33-35) Officer McLaughlin testified that he was unable to detect the odor of ether when he arrived at the shed immediately after it had been searched on the morning of July 13, 1980 (R.T. V.I, p. 136)

Called by the Government, in rebuttal, Richard Holguin testified that he accompanied Sergeant McLaughlin to the area of the Avenue 320 residence on July 12, 1980. (R.T. V.II, p. 88) Officer Holguin testified that he was seated on the right front passenger seat when they drove by the residence between 10:00 and 11:00 p.m. on July 12, 1980. Holguin stated that he rolled down his window as they passed by the Avenue 320 residence at approximately 5 miles per hour, once in each direction. (R.T. V.II, pp. 89-90) Holguin testified that he was familiar with the odor of ether from hospital settings and testified that

he detected the odor of ether for a short period of time as if they were crossing a stream, as they passed in front of the driveway area. (R.T. V.II, pp. 90-91) Holguin recalled that McLaughlin advised him that they were going to the area to try to locate a PCP lab, in the area of Avenue 320. (R.T. 94-95) Holguin described the width of the driveway as approximately 6 or 7 yards. (R.T. V.II, pp. 97-98) Holguin drew a diagram depicting the driveway that led to the house and the roadway that led to the shed. (R.T. V.II, p. 101) Holguin stated that as they drove in front of the premises the only place that he detected an odor was from the entrance of the roadway to the shed of approximately 10 to 15 feet and on either side of the roadway there was no odor. (R.T. V.II, pp. 103-104) Holguin stated that they did not stop at the location nor did they get out of the vehicle to make further observations. (R.T. V.II, pp. 104-105)

Holguin admitted that he really couldn't tell if the odor was coming from the driveway or in the street itself, except there was a slight breeze that was blowing from north to south so he believed it was coming from a location north of where they were driving (R.T. V.II, pp. 105-106) Holguin stated that one of the purposes for being in the area was to investigate the information McLaughlin had received and part of that was the smell of ether. (R.T. V.II, p. 109) Holguin admitted that he did not know whether or not the odor came from the house, from the shed or from a diesel engine. (R.T. V.II, p. 116) Holguin testified that when he was there to serve the search warrant he could not detect the odor he had previously, when he had passed by in the vehicle. (R.T. V.II, p. 117) Holguin stated that it was not until he was within 5 yards of

the shed that he detected a chemical odor but not that of ether, at the time of serving the search warrant. (R.T. V.II, p. 118).

Despite the evidence adduced during the hearings, the Honorable M. D. Crocker, Federal District Judge, denied defendant's Motions to Quash the Avenue 320 search warrant and to Suppress the Evidence seized pursuant to said warrant. (R.T. V.II, p. 130)

Shortly before the Avenue 320 residence was searched, defendants were detained and arrested, without a warrant, and the automobile in which they were riding was also searched without a warrant, and evidence seized. The evidence and testimony introduced at the defendants' Motion to Suppress established that the defendants detention and arrest was not based on reasonable suspicion or probable cause but rather on the fact that the *Avenue 320 search warrant* had been issued.

Officer Miller testified that he came on duty at approximately 1:00 a.m. on the morning of July 13, 1980. (R.T. V.I, p. 67) At that time, Miller was briefed by McLaughlin and told that the Avenue 320 residence was under surveillance as a suspected PCP lab, that the suspects were black males believed to be from the Los Angeles area driving a white van, and he intended to obtain a search warrant for said residence. (R.T. V.I, pp. 67-68) After the briefing by McLaughlin, Miller proceeded to a surveillance location approximately two-tenths of a mile from the Avenue 320 residence. After arriving at the location, Miller waited there for awhile and at one point walked by the suspected residence at approximately 3:30 in the morning at which time he detected the odor of cyclohexanone. (R.T.

V.I, p. 69) Miller indicated that at 5:08 a.m., a station wagon drove by his location, pulled into the rear of the residence and went to a metal shed. The lights were shut off and people began moving around near the shed. (R.T. V.I, p. 70).

Miller continued watching the location and advised McLaughlin of what was happening in addition to other units on the surveillance. (R.T. V.I, pp. 70-71) As the day got progressively lighter, Miller indicated that he observed three to five black males, who appeared to be carrying packages and buckets around the shed and two or three wearing rubber gloves. (R.T. V.I, p. 71) At 5:45 a.m., the suspects closed the door to the shed, appeared to lock it, entered the station wagon and departed the area. (R.T. V.I, p. 71) Miller notified McLaughlin as to what had transpired and McLaughlin advised Miller that the search warrant for the Avenue 320 residence had been signed. No further communication between Miller and McLaughlin occurred due to an apparent breakdown in communications. (R.T. V.I, pp. 71-72)

Miller followed the station wagon for approximately five miles and at that time "made a felony stop on the vehicle." (R.T. V.I, p. 72) Miller testified that "[t]he decision to stop them was mine based on what I had observed and the fact that the search warrant [regarding the Avenue 320 residence] had been signed." (R.T. V.I, p. 79) Miller testified that his purpose in stopping the individuals was "to detain them so that Sergeant McLaughlin could arrive, serve them with the search warrant, then we could go back and do the house." (R.T. V.I, p. 80)

Miller stated that he arrested the defendants when they got out of the station wagon upon detecting an odor of ether. (R.T. V.I, p. 73).

A search of defendants and the station wagon produced two keys to a nearby Holiday Inn, a key to a white Ford van (later found in the parking lot of the Holiday Inn) (R.T. V.I, p. 59), some whitish powder found in the hair of one of the suspects (R.T. V.I, p. 73), and two pistol cases containing handguns located on the right rear floor board of the station wagon. (R.T. V.I, p. 74)

The defendants moved to exclude the evidence mentioned above on the grounds that the felony stop was unlawful because (1) the activity observed by agent Miller failed to indicate any illegal activity, (2) the defendants were not free to leave following the initial stop thus amounting to a seizure of defendants without probable cause, (3) mere presence at a location *prior* to the execution of a search warrant is not sufficient probable cause or founded suspicion that illegal activity is occurring to justify the detention of the defendants pending the arrival of McLaughlin, and (4) the defendants arrest was not supported by probable cause. (C.R. 14:38-42)

Officer McLaughlin, in his affidavit in support of the search warrant for the 1977 Ford van, incorporated his affidavit in support of the Avenue 320 search warrant and made reference to items seized during that search and the two hotel keys seized from the defendants following their arrest. Within the affidavit, Officer McLaughlin states that upon approaching the van, he detected a strong odor of ether coming from within. McLaughlin further stated that he observed in plain view the following items:

1. Triple beam scale and box;

2. Three 5 gallon black cans, same as those located at the residence at 5580 Avenue 320, Visalia;

3. One 5 gallon water bottle;

4. Numerous 5 gallon buckets same as those located at the residence; and

5. Bag indicating contents of rubber gloves. (C.R. 1-a)

A subsequent search of the van revealed additional chemicals utilized in the manufacturing of PCP and approximately two pounds of PCP. (C.R. 43: 8)

The defendants argued that the search warrant regarding the 1977 Ford van should be quashed and the evidence suppressed on the grounds that (1) the affidavit in support of the search warrant for the van was predicated on the illegality of the confiscation of the two hotel keys and the search of the residence at Avenue 320, and (2) the affidavit for the Ford van failed to establish probable cause for the issuance of a search warrant. (C.R. 14: 43-45)

The Honorable Judge Crocker denied the Motion to Suppress the Evidence seized from the Ford van and further ruled that the stopping of the station wagon was valid and the arrest was proper and founded on probable cause. (R.T. V.I, pp. 63, 161) The prosecution then stated that the affidavit might be a little weak and requested that the Court find that Officer McLaughlin in obtaining and executing the search warrant did so in good faith and that he was acting lawfully. The Court found no reason to

"challenge" his good faith (R.T. V.I. p. 161), whatever that meant.

The Ninth Circuit Court of Appeals reversed, invalidating the searches. (Cert. Pet. Appendices "A" and "B") It found sufficient compliance with *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969), but insufficient evidence of criminal activity. (ibid. 5a-6a.)

The Government petitioned for a rehearing, solely on the ground that the search of the premises was lawful (Appellee's Pet. for Reh. pp. 1-8). The Petition for Rehearing was denied. (Cert. Pet. Appendix "C")

The Solicitor General filed a Petition for Certiorari urging that this case be reversed under a "good faith mistake" rule presently being urged upon this Court. *United States v. Tate, et al.* (No. 83-24).

I. PREFATORY COMMENT

Although this Court in the *Tate* case is asked to analyze the application of the "good faith mistake" proposal in terms of both the search of the shed pursuant to a search warrant and a warrantless automobile stop with an accompanying arrest and search, the good faith argument was never urged below, except as it was applicable to the search pursuant to a warrant. See Appellee's Brief on Appeal, pp. 27-32, Appellee's Petition for Rehearing, pp. 1-8, and the oral argument before the 9th Circuit Court of Appeals. Furthermore, at no time was it suggested that there was any reason for the police officers to have be-

lieved that they had probable cause to search based on law other than the simple fact that they recited data (highly misleading as explained before and after) to a State Court Judge who then issued a search warrant which subsequently he was prevented from examining as prescribed under California law, Calif. Penal Code §1538.5(b), established to vindicate both Federal and State seizure claims because the case was cleverly abducted into the Federal Courts. And in the petition for certiorari in this case, not one decision, not one statute, not one administrative regulation—*Ker v. California*, 374 U.S. 23 (1963); *People v. Busendine*, 13 Cal. 3d 528 (1975); *People v. Triggs*, 8 Cal. 3d 884 (1973)—nothing is cited justifying the reasonable belief that the police had probable cause to search. Rather, the frightening proposition being urged here is that a police officer who can persuade a Judge to grant a warrant—and deliberately bypass the legislative rules specifically enacted which permit him to review the circumstances of its issuance—(discussed *infra*) has sufficient justification to transgress upon the privacy interests this Court has long held protected by the Fourth Amendment. Consistent with the intriguing argument that the Government should win all of its search and seizure cases regardless of the circumstances it requests that certiorari be granted, citing the recent trio of cases wherein this Court granted certiorari, namely, *United States v. Leon*, cert. granted, No. 82-1771 (June 27, 1983); *Massachusetts v. Sheppard*, cert. granted, No. 82-963 (June 27, 1983); and *Colorado v. Quintero*, cert. granted, No. 82-1711 (June 27, 1983). See Tate cert. pet. pp. 7-8.

All three of these cases vary substantially from the *Tate* case and, above all, are at least minimally blessed

with the assertion that there were reasonable grounds to believe the police conduct involved was authorized under existing law.

Let us first examine the case of *United States of America v. Leon, et al.* (82-1771). As noted above, the Government does not contend in the *Tate* case that the lower Court cushioned its analysis upon failings in the cases of *Aguilar* and *Spinelli* and does not even bother to cite them. In fact, in *Tate*, Ninth Circuit Court of Appeals found that the probable cause requirements of *Aguilar* and *Spinelli* were satisfied. (*Tate* cert. pet. pp. 5a-6a). However, *the only two cases cited in Leon are Aguilar* and *Spinelli* (*Leon* Cert. Pet. iii) and it is obvious that the entire case hinges upon their interpretation and application. In fact, those cases constitute the fountainhead of the lower Court's analysis.

Leon was a multi-defendant narcotics trafficking case. The Government, in an introduction to a discussion of the facts, recited in the affidavit supporting the search warrant prefaces its analysis with a footnote informing this Court that "For the sake of brevity, only the most pertinent details of the affidavit are recounted here; however, the affidavit contains other information tending to support the existence of probable cause." (*Leon* Cert. Pet., p. 2, fn. 3.). The Government's Petition then proceeds to recount a month long surveillance conducted by experienced narcotics officers revealing facts which in no way, shape or fashion resemble the facts related in the *Tate* affidavit. For example, in *Leon* there were confidential informants with first hand evidence of large narcotics dealings and the stashing of an enormous amount of money in a shoe box by two of the principal suspects. There was

comprehensive detailed information concerning the various suspects, almost all of whom had backgrounds of narcotics activity, and proof that they interacted with each other feverishly and clandestinely in Los Angeles and engaged in narcotics trafficking between Miami, Florida and Los Angeles, California. One of the suspects had been arrested at the Miami airport in possession of fifty pounds of contraband while attempting to board a flight to Los Angeles. Two of the suspects, one of whom had previously been arrested for possession of narcotics in Miami and on another occasion when stopped at the Miami airport, had $20,000 on his person, travelled to Miami and back to Los Angeles under mysterious circumstances. Although they travelled to Miami on the plane together and sat together on their return flight, they deliberately split up upon their arrival at the Los Angeles airport only to reunite at the exit gate to the terminal. A consented-to search produced contraband. Moreover, criminal record checks unearthed narcotics records for almost all of the suspects and utility checks and automobile registration checks and police surveillance verified the information which the police had received from the informants. Furthermore, the surveillance disclosed numerous furtive escapades and frequent momentary visits between the parties at different addresses, routinely resulting in the visitors leaving with paper bags or small receptacles which were apparently stored away in the trunks of the vehicles.

The trial court, while suppressing the evidence under *Spinelli*, found that the police officers were acting in good faith premised upon the month long investigation and the obtaining of a warrant having "laid a meticulous trail," and consulting "with three Deputy District Attorneys be-

fore proceeding (*Leon* Cert. Pet. pp. 7-8). The Government argues, as did the dissenting Judge on Appeal, that the affidavit "revealed to experienced investigators a continuous pattern of conduct that was 'inconsistent with any explanation other than illegal drug activity.'" (ibid.)

For the reasons articulated above and reiterated hereafter, both the legal arguments and the factual quilt differ vastly in the *Tate* and *Leon* cases. In fact, after reading the affidavit in the *Leon* case, it is obvious that it is almost an exact replica of *Illinois v. Gates, infra.*

The Solicitor General also notes that this Court recently granted certiorari in the case of *The State of Colorado v. Quintero* (82-1711). Quintero was convicted in a Colorado state court for the crime of second degree burglary, but the conviction was reversed by the Colorado Supreme Court because the Court concluded that the evidence against him was illegally seized under the doctrines enunciated by this Court in *Terry v. Ohio,* 392 U.S. 1 (1968) and *Brown v. Texas,* 443 U.S. 47 (1979) (Colorado Cert. Pet. pp. 21-23).

The facts, presented from the viewpoint of the Petitioner—the State of Colorado—disclose that the informing party, Mrs. Bergan, was sweeping her porch shortly after noon when she observed the defendant go onto the porch of a house across the street and first peer into the front door for twenty seconds, then the front window for another twenty seconds and finally walk around to the side of the house and examine it. The neighbor regarded this behavior as strange and so she continued to observe him as he crossed the street and disappeared from her sight.

About forty minutes later she saw the defendant standing at the bus stop in front of her home. He had removed his short sleeved shirt and thrown it over a television set, which had suddenly appeared, and was pacing nervously attempting to hitchhike while awaiting the bus. Mrs. Bergan called the police and the radio dispatcher reported a possible burglary suspect at the bus stop, wearing a T-shirt and carrying a television set covered with a shirt. A Denver police officer, with twenty-one years experience, arrived within five minutes of receiving the call, spotted the defendant and asked him for identification. He had none and claimed that he had paid someone in the neighborhood $100 for the television set. Within two or three minutes other officers arrived and the complaining witness, Mrs. Bergan, detailed precisely what she had seen. The Defendant was then arrested and searched. It was a hot day—with the temperature in the 80's—but the defendant had a pair of brown wool gloves in his back pocket. Under his shirt was not only a television set but a video game. The police also discovered $139 in cash; five rings, including two class rings with different initials and class years; and, some ladies jewelry when the defendant was searched at police headquarters. Later that day the couple whose home was burglarized, upon returning to their house, reported the burglary and theft of the TV set and video game. (Colo. Cert. Pet. pp. 4-5). The arresting officer testified that in burglary situations it is common for the crime to be committed when the occupants of the home are absent and, consequently, evidence that the crime was committed often precedes the actual discovery by the victims that the larcenous objects of the burglary were actually stolen (Colo. Cert. Pet. p. 10).

From reading the Petition for Certiorari, two factors are noteworthy: It appears that the case should be resolvable within the *Terry-Sibron-Peters* trilogy; see *Terry v. Ohio*, 372 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 70 (1968); establishing a "good faith mistake" exception to the exclusionary rule, which California has not done; nor has Congress. Neither of these principles are apposite to the *Tate* case. Finally, counsel has recently learned that Mr. Quintero is now deceased and thus his case is moot.

This Court also granted certiorari in the case of *Commonwealth of Massachusetts v. Sheppard* (82-963). *Sheppard* was a homicide case with lavish probable cause justifying the search which was questioned, namely the search of a domicile pursuant to a search warrant. The issue in the case revolves around the significance to be accorded the fact that, while the application for the warrant spelled out ample probable cause for the search, designated the premises to be searched and the items which were the object of the intended search, the warrant itself was an outmoded narcotics form warrant based on a statute repealed eight years before and which failed to comply with the Constitutional requirements detailing the objects of the search and neither incorporated the affidavit by reference nor was attached to the affidavit. The question for this Court in *Sheppard* is whether the conduct by the magistrate—and conceivably the police officer involved—in drawing up a defective warrant was simply a technical flaw or amounted to a meaningful transgression of Fourth Amendment requirements justifying the application of the exclusionary rule. That case is not even remotely similar to the *Tate* case. However,

it does illuminate some interesting policy considerations relating to whether this Court should condone such slipshod practices which, if approved, will surely make magistrates less diligent in performing their Constitutional functions in the issuance of search warrants and thereby "encourage violation of the Constitution," *United States v. Janis*, 428 U.S. 433 at 458, n. 35 (1976).

It also highlights the fact that judicial responsibility to comply with the Fourth Amendment, in addition to the duties of law enforcement, is, as always, a critical concern of our courts.

II. The History And Development Of The Exclusionary Rule

In 1914, this Court decided that evidence obtained by Federal officers in violation of the Fourth Amendment to the United States Constitution forbidding unreasonable searches and seizures was inadmissible in all of the Federal Courts of our land. *Weeks v. United States*, 232 U.S. 383. That rule has persisted until this day.

In 1949, this Court ruled that the Fourth Amendment guarantee against unreasonable searches and seizures applied to the activities of state police officers as well, but that the *Weeks* exclusionary rule was not a mandatory method for enforcing the essential guarantees of the Fourth and Fourteenth Amendments. *Wolf v. Colorado*, 338 U.S. 25, 27-28. Prior to the *Wolf* decision, States were under no compulsion to pay heed to the search and seizure guarantees of the United States Constitution. However, the *Wolf* court issued a stern admonition:

> "(W)e have no hesitation in saying that were a State affirmatively to sanction such police incur-

sion into privacy it would run counter to the guaranty of the Fourteenth Amendment." at p. 28.

In the subsequent case of *Irvine v. California*, 347 U.S. 128 (1954), Justice Jackson, spokesperson for the majority declared:

> "Now that the *Wolf* doctrine (the guarantee of the Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth) is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the (exclusionary) rule would be an unwarranted use of federal power." at p. 134.

By 1955, the California Supreme Court in the oft-quoted and relied on decision of *People v. Cahan*, 44 Cal. 2d 434 (1955), (see e. g., the landmark cases of *Mapp v. Ohio, supra*, 367 U.S. at p. 659; *Ker v. California*, 374 U.S. 23, at pp. 29-31; *Elkins v. United States*, 364 U.S. 206 at pp. 220-222) declared:

> "Thus, after states that rely on methods other than the exclusionary rule to deter unreasonable searches and seizures have an opportunity to reconsider their rules in the light of the *Wolf* doctrine, the way is left open for the United States Supreme Court to conclude that if these other methods are not 'consistently enforced' and are therefore not 'equally effective' see *Wolf v. Colorado, supra*, . . . , the minimal standards' of due process have not been met." *People v. Cahan, supra*, at p. 441.

And further:

> "Thus, when consideration is directed to the question of the admissibility of evidence obtained in violation of the constitutional provisions, it bears emphasis that the court is not concerned solely with the rights of the defendant before it, however, guilty he may appear, but with the constitutional right of

all of the people to be secure in their homes, persons, and effects." at p. 439.

The *Cahan* Court also noted:

> "both the United States Constitution and the California Constitution make it emphatically clear that important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected." at p. 438.

Chief Justice Traynor, speaking for the *Cahan* Court determined that evidence obtained in violation of these constitutional guarantees was inadmissible.

> "We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers." at p. 445.

The Court also expounded as follows:

> "Experience has demonstrated, however, that neither administrative criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court. 'Alternatives (to the exclusionary rule) are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. For there is but one alternative to the rule of exclusion. That is no sanction at all' . . . The difficulty with (other remedies) is in part due to the failure of interested parties to inform of the offense. No matter what an illegal raid turns up, police are unlikely to inform on themselves or each other. If it turns up nothing incriminating, the innocent victim usually

does not care to take steps which will air the fact that he has been under suspicion.' (Justice J., in *Irvine v. California, supra*). Moreover, even when it becomes generally known that the police conduct illegal searches and seizures, public opinion is not aroused as it is in the case of other violations of constitutional rights. Illegal searches and seizures lack the obvious brutality of coerced confessions and the third degree and do not so clearly strike at the very basis of our civil liberties as do unfair trials or the lynching of even an admitted murderer. 'Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends.' (Frankfurter J. dissenting in *Harris v. United States*). There is thus all the more necessity for courts to be vigilant in protecting those constitutional rights if they are to be protected at all. . . . *People v. Mayen* . . . was decided over thirty years ago. Since then case after case has appeared in our appellate reports describing unlawful searches and seizures against the defendant on trial, and those cases undoubtedly reflect only a small fraction of the violations of the constitutional provisions that have actually occurred. On the other hand, reported cases involving civil actions against police officers are rare, and those involving successful criminal prosecutions against officers are non-existent. In short, the constitutional provisions are not being enforced.

"Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives." at p. 448.

In 1960, in the case of *Elkins v. United States, supra,* this Court overturned the "silver platter" doctrine, aptly named because hitherto it permitted state law enforcement agents—who were increasingly carrying out the duties of "ferreting out crime" to violate the United States Constitutional prohibition against searches and seizures with impunity by testifying and presenting evidence to convict defendants in federal tribunals unmolested because evidence seized by them was admissible despite *Wolf.*

Recognizing that privacy once invaded can never be totally restored, this Court applied the exclusionary rule to evidence obtained by state officers which violated the Fourth Amendment forbidding its introduction in a federal forum. The Court decided:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. Mr. Justice Jackson summed it up well: 'Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
>
> "'Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. . . .'" at pp. 217-18.

In 1961, this Court in the case of *Mapp v. Ohio, supra,* overruled that portion of *Wolf v. Colorado* which held that the exclusionary rule was not enforceable against the States and held that,

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." at p. 655.

Mapp reiterated the rationale for the exclusionary rule:

> "Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins v. United States, supra.*" 367 U.S. at 656.

The principal rationale for the exclusionary rule has remained the same until this day.

> "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> "'(T)he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' *Linkletter v. Walker,* 381 U.S. 618 (1965).
>
> "Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures:
>
> "'The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *El-*

kins v. United States, . . . In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, at 347-48 (1974). "(T)he courts must not commit or encourage violations of the Constitution." *United States v. Janis*, 428 U.S. 433, 458, n.5 (1976).

III. Reasons Proffered For Severe Limitations Upon The Exclusionary Rule

What this Court has done is utilize cases where the exclusionary rule demonstrably was incapable of enforcing Fourth Amendment rights as a launching platform for an attack upon the vitality of the rule itself. The very fact that this Court has exhibited the capacity to establish law which withholds the exclusion of evidence in certain situations without damage to the Fourth Amendment argues for the continuation of such a judicial approach, not for its abandonment.

This Court's disenchantment with the exclusionary rule and skepticism concerning its efficacy has burgeoned in the context of principally five decisions of this Court to which we now turn.

In *United States v. Calandra*, 414 U.S. 338 (1974), a majority of this Court held that questions posed to a witness at a Federal Grand Jury proceeding based upon evidence which was illegally seized from the witness during a prior search could not be contested at that phase of the proceedings although, were the witness to become a defendant, he could object to the evidence at trial and the exclusionary rule would apply.

Pursuant to a search warrant federal agents conducted a thorough search of Calandra's place of business in quest of bookmaking records and waging paraphernalia. During that search they chanced upon a promissory note showing that a certain Dr. Loveland had been making periodic payments to Calandra and were already in possession of information that the United States Attorney's office was investigating extortionate credit transactions wherein Dr. Loveland had been the victim of an extortionate enterprise. The agent discovering the document concluded that it was a loansharking record and therefore seized it. Subsequently, a Federal Grand Jury investigating loansharking activities subpoenaed Calandra to testify before them and he invoked the privilege against self-incrimination. The Government granted him transactional immunity. Calandra obtained a postponement so as to contend that the affidavit supporting the search warrant was insufficient and that the search exceeded the scope of the warrant. At a Federal District Court hearing, the search was declared illegal and Calandra was exempted from testifying concerning the illegally obtained evidence. The Court of Appeals affirmed.

This Court extensively reviewed the history and function of the Grand Jury, noting that it had always been a secret body which met to ascertain whether crimes had been committed and to protect innocent citizens against subsequent accusation. The Grand Jury proceeding is not adversary in nature. No Judge presides over the proceedings and hearsay or other incompetent evidence is sufficient to result in an indictment. No attorney is provided because there is no accused. A witness may invoke the Fifth Amendment, however, so long as he is not granted

immunity commensurate with the breadth of the privilege. If a person's search and seizure rights are violated, the evidence will be excluded at trial, a fact known to the United States Attorney who routinely conducts the proceedings. The Court, finding the deterrent aspects *de minimis* at best, held the exclusionary rule inapplicable to Grand Jury proceedings. It reconfirmed that:

> "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> "'(T)he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' . . .
>
> "Instead the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures:
>
> "'The rule is calculated to prevent, not to repair it. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'
>
> "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." at pp. 347-48.

In *United States v. Peltier*, 422 U.S. 531 (1975), the issue as formulated by the five member majority of this Court, was whether to apply the newly decided case of *Almeida-Sanchez v. United States*, 413 U.S. 266, which invalidated warrantless roving border patrol searches retroactively so as to reverse all of the convictions of those persons where the evidence was secured by searches and seizures based upon the law as it existed at the time they were

conducted. This Court analyzed the retroactivity doctrine in the area of search and seizure and concluded that no meaningful purpose underlying the Fourth Amendment prohibition against unlawful searches and seizures would be furthered by reversing convictions based upon police conduct which was lawful at the time of its occurrence.

The Court pointed out that Circuit Court decisions "strongly suggested that the statute and the Border Patrol policy were acceptable means for policing the immigration laws." at p. 541. Also, "It was in reliance upon a validity enacted statute, supported by long standing administrative regulations and continuous judicial approval, that Border Patrol agents stopped and searched respondent's automobile." at p. 542. This Court further stated that even *Almeida-Sanchez* itself acknowledged that, prior to its being decided, the searches declared illegal by the decision had been uniformly upheld by the very jurisdictions confronting the severe border problems. at p. 541.

Finally, the Court opined regarding the principle of "judicial integrity," as a basis for the exclusionary rule, that law enforcement compliance with the constitutional precepts governing their behavior at the time it was engaged in "did not make the courts 'accomplices in the willful disobedience of a Constitution they are sworn to uphold.' *Elkins v. United States, supra,* at 223." 422 U.S. at p. 536.

In *Michigan v. DeFillipo,* 443 U.S. 31 (1979), at approximately 10:00 p.m. Detroit police officers on duty in a patrol car received a radio call to investigate two persons reportedly situated in an alley and intoxicated. Upon arriving at the scene they saw a young woman—

in the process of lowering her slacks—and the defendant. When asked what she was doing, the woman stated that she was about to relieve herself. When one of the officers asked the male defendant for identification he claimed that he was Sergeant Mash of the Detroit Police Department and gave a badge number. A moment later he changed his story and said that he either knew Sergeant Mash or worked for him. These statements were false. The defendant was arrested for violating a Detroit ordinance which permitted a police officer to stop and question an individual if he had reasonable cause to believe that his behavior warranted further investigation for criminal activity and that it was unlawful for any person stopped under that law to refuse to identify himself and produce evidence of his identity. When the defendant failed to identify himself he was arrested and a search revealed a package of marihuana in one of his shirt pockets and PCP in a tinfoil packet secreted inside a cigarette package in the other. He was ultimately charged with possessing the controlled substance, but not with violating the ordinance. The Michigan Courts declared the ordinance under which the defendant was arrested unconstitutionally vague and suppressed the evidence. Chief Justice Burger, speaking for five members of this Court first explained that "(w)hether an officer is authorized to make an arrest ordinarily depends, in the first instance on state law. . . ." at p. 36. The Court then held the arrest and consequent search and seizure lawful since it was authorized by a law presumably valid at the time the police officers were called upon to obey it. The Chief Justice stated:

> "A prudent officer, in the course of determining whether respondent had committed an offense under

all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence could be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." at pp. 38-39.

Mr. Justice Blackmun concurred, acknowledging concern over the fears expressed in the dissent of Mr. Justice Brennan, joined in by Justices Marshall and Stevens, that police could utilize laws violative of search and seizure guarantees as a pretext for an arrest and then conduct a search. Justice Blackmun found that the record in the case did not support such abuse, but that if it did, the arrest, search and seizure would clearly be unlawful.

In *United States v. Janis,* 428 U.S. 433 (1976), a Los Angeles police officer obtained a search warrant directing him to search for bookmaking parapherenalia but subsequent to the issuance and execution of the warrant this Court decided the *Spinelli* case and, based upon that decision, the same magistrate who issued the warrant quashed it and suppressed the evidence. After the execution of the search warrant, but before the State court invalidated the search the searching officer turned over to the IRS nearly $5,000 in cash and certain wagering records. Subsequent to the State court dismissal the de-

fendant filed a taxpayer suit in the United States District Court seeking a refund of the money taken from him during the search and the Government counterclaimed for additional monies it maintained were due based upon a wagering tax assessment predicated upon an analysis of the wagering records obtained during the defective search. Mr. Justice Blackmun, speaking for five members of this Court, decided that there was no precedent holding that evidence illegally seized by state officers was inadmissible in a federal *civil* proceeding and deemed the federal proceeding to be civil in nature. He was careful to explain that the defendant had prophylactics against illegally obtained evidence being used against him in criminal prosecutors both in the State court and in the Federal Court and the case was ultimately remanded to ascertain if there was any federal participation with the state officers which would then raise the issue as to whether the evidence could be utilized in federal court even in civil cases. In the absence of such evidence he concluded that the exclusionary rule need not be stretched to foreclose the use of the materials in a federal civil proceeding and distinguished the *Plymouth Sedan v. Pennsylvania,* 380 U.S. 693 (1965) car forfeiture case on the ground that "forfeiture is clearly a penalty for the criminal offense." Mr. Justice Blackmun stated that deterrence of Fourth Amendment violations was the prime purpose of the exclusionary rule and that there was not sufficient likelihood to believe that exclusion of the evidence from the federal civil proceeding would deter the state police officer who had already been penalized by having his case dismissed. pp. 448, 459 n. 7b.

The case of *Stone v. Powell,* 428 U.S. 465 (1976) was in reality two cases. Two state prisoners, both con-

victed of homicide, one in a California state court and the other in a Nebraska state court, sought federal habeas corpus relief on the ground that illegally obtained evidence had been introduced at their respective state trials. The Eighth and Ninth Circuit Courts of Appeal agreed with the prisoners' positions. This Court reversed, holding that where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that the evidence was obtained in an unconstitutional search or seizure and introduced against him at his trial.

Although in *Stone v. Powell,* there was much discussion of the history of the "Great Writ of Habeas Corpus" and its modern day functions as well as generalized criticisms of the exclusionary rule in certain cases, all that was necessary for the decision was the acknowlment that since *Mapp v. Ohio, supra,* it was clear that state courts were obliged to enforce the Fourth Amendment in state court proceedings and that a contemporary view showed that state court judges were not unable or unwilling to vindicate federally guaranteed constitutional rights. The opinion of Mr. Justice Powell, speaking for a six person majority, upheld both propositions:

> "The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this court on certiorari is an inadequate safeguard. The

> principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344, 4 L. Ed. 97 (1816). Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems. In sum, there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the (consideration of Fourth Amendment claims) than his neighbor in the state courthouse.'" 428 U.S. 493, n. 35.

Since this Court retains certiorari jurisdiction to review state court decisions, all the court concluded in *Stone* was that, search and seizure claims can receive fair and comprehensive appraisal without the necessity for supplying a federal forum to litigate them.

The arguments which memebers of this Court have advanced for establishing a "good faith mistake" exception to the exclusionary rule are self-refuting. Rather than illuminate the need for such a rule, the decisions wherein the Justices have spoken most vehemently provide ample authority for resisting the application of the exclusionary rule when it doesn't serve the office of protecting Fourth Amendment guarantees by removing the temptation or incentive to infringe upon them.

In cases such as *Peltier* and *DeFillipo*, the Court declined to apply the exclusionary rule to senselessly penalize law enforcement for not being sufficiently prescient to anticipate that the laws under which they had been schooled and traditionally operated would subsequently be declared invalid. The doctrine previously developed by this Court applying changes in the law only prospectively where retroactive application could not further Fourth Amendment objection provided an appropriate basis for the decisions and others which will arise. See *United States v. Peltier, supra,* at 535-39. Rendering evidence inadmissible could not have impacted law enforcement behavior. In *Calandra,* this Court charted the advent and development of the Grand Jury, historically and functionally, concluding that it was not an adversary proceeding and that the application of the exclusionary rule prior to the initiation of judicial proceedings would have appreciably hindered the function of the Grand Jury in the fulfillment of its responsibilities. However, this Court made it abundantly clear that, should the defendant emerge as an accused, the evidence illegally seized would be inadmissible against him at trial. In *Stone v. Powell,* this Court relied on Fourth Amendment decisions to hold that state courts were mandated to exclude illegally obtained evidence and experimentally did so on a daily basis and that those adjudications were subject to review both by state appellate courts and this Court. The Court found no Constitutional compulsion to afford cumulative review in a federal forum, especially at a point where the exclusionary rule was manifestly purposeless. In *Janis,* this Court simply held that Fourth Amendment rights couldn't be vindicated by planning a deterrent scenario around the contemplation that a state

police officer would engage in an unlawful search and seizure envisoning that the Federal Government might subsequently visit civil consequences upon the target of his search. Even there, proof of federal participation in the state law enforcement enterprise would have presented a question upon which the Court did not pass even if the federal proceedings were "civil" in nature.

In addition to the above, the smorgasboard of judicial decisions which limit the exclusionary rule where it fails to serve as a meaningful prophylactic against Fourth Amendment violations, such as the standing requirement, dissipated taint, harmless error, non-retroactive application, accelerated booking searches, the inevitable discovery doctrine, exigent circumstances, brightline formulations and the like, constitute ample precedent for this Court to place limitations on the exclusionary rule consonant with upholding the Fourth Amendment.

Interestingly, the Solicitor General graphically illustrates that not only this Court, but, under the guidance of this Court, other courts have declined to apply the exclusionary rule in cases where it was not warranted—an argument attesting to the potency of this Court to articulate exceptions to the exclusionary rule when it fails to protect Fourth Amendment guarantees. (Gates Br. pp. 15-18). But then the Solicitor General reaches the flawed conclusion that such successes are evidence of failure and that the generalized "good faith mistake" exception must follow from the successful applications of limitations on the exclusionary rule. The proponents of the attack on the exclusionary rule fail to state arguments which lead to their conclusions.

This Court should resist the temptation to create a "good faith mistake" exception which will surely emasculate not just the exclusionary rule but the Fourth Amendment itself, as we will shortly demonstrate.

IV. Arguments For A Good Faith Mistake Exception To The Exclusionary Rule.

Mr. Justice White has contended that if law enforcement officers entertain a reasonable, albeit mistaken, good faith belief that they are conducting lawful searches and seizures, it serves no purpose to exclude reliable evidence obtained and frequently free the criminal whom they have apprehended. See *Illinois v. Gates, supra,* 76 L. Ed. 2d 558-67 (White J. concurring); *Stone v. Powell, supra,* at pp. 538-40 (White J. dissenting). This viewpoint is also argued by the Solicitor General. (Gates Br. pp. 4, 63-64).

Initially, it must be understood that we are not merely concerned with flagrant or grotesque violations of the Fourth Amendment, since they were manageable under a due process rule of exclusion which antedated *Mapp v. Ohio,* decided by this Court in 1967. See e.g. *Irvine v. California, supra; Rochin v. California,* 342 U. S. 165 (1952). See *Illinois v. Gates,* 76 L. Ed. 2d at 562, n. 14 (White J. concurring).

Nor are we speaking of what some members of the Court, as well as the Solicitor General, have labelled police "fault" or "misconduct." See e.g. *Stone v. Powell, supra,* at p. 540 (White J. dissenting); *Illinois v. Gates, supra,* 76 L. Ed. 2d at 562-63.

Gates Br. pp. 4, 30-32, 35-36, 63-64. Moreover, to characterize arrests, searches and seizures, invasions of privacy and the right to be let alone which do not comport with the Fourth Amendment as police "misconduct" not only misstates the parameters of the Fourth Amendment but does a disservice to law enforcement—whose attitudes and activities are the central concern of those who seek to modify the exclusionary rule. The purpose of the exclusionary rule is to encourage the protections of Fourth Amendment rights irrespective of police "fault" or "misconduct." And thus those who urge a drastice change in the exclusionary rule not only must bear the burden of showing an incapacity for rendering decisions which will guide the lower courts in the refusal to apply the rule in situations where it makes little or no sense, but must clearly show that the general formulation of a new rule to be applied by the individual courts in this country does not eviscerate the Fourth Amendment itself. If not, what in reality this Court is saying is that not only is the exclusionary rule a creature of Court origin, but so is the Fourth Amendment—a tenet totally without foundation in any of the opinions of this Court.

Ironically, the detractors of the exclusionary rule point with pride to the ability of this court to desist from applying it when it fails to do its job as the justification for eroding the Fourth Amendment itself. See e.g. *Illinois v. Gates, supra,* 76 L. Ed. 2d at 559-60 (White J. concurring); so does the Solicitor General (Gates Br. pp. 15-18).

The issue here is whether the enunciation of the proposed good faith mistake rule by this Court—to be administered embryonically by a myriad of lower courts throughout the United States—will ensure the Fourth Amendment

guarantees to our citizens which those courts are duty-bound to enforce. *Weeks v. United States, supra; Mapp v. Ohio, supra.*

At this point let us examine the various reasons suggested for severely tampering with the exclusionary rule. Chief Justice Burger argued in *Stone v. Powell, supra*, that the Court had been vacillating and confusing in its analysis of the reasons for the exclusionary rule. As he put it:

"The rhetoric has varied with the rationale to the point where the rule has become a doctrinaire result in search of validating reasons." 428 U. S. at p. 496. (C.J. Burger concurring). And yet, despite some disagreement, the decisions of this Court have now made it abundantly clear that the chief rationale for the exclusionary rule is the deterrence of Fourth Amendment violations and that "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution." *United States v. Janis, supra,* at pp. 458-59 n. 35; see also *United States v. Calandra, supra* at 348; *Illinois v. Gates, supra* at 562, n. 14 (White J. concurring).

Speaking of *United States v. Janis, supra,* the Chief Justice further remarked:

> "In the face of dwindling support for the rule some would go so far as to extend it to civil cases." *United States v. Powell,* 428 U. S. at p. 499.

The fact that three Justices dissented in *Janis,* two of whom would have applied the exclusionary rule to evidence offered in civil proceedings in a Federal Court (Brennan J. dissenting joined by Marshall J. at p. 460.) (White J. concurring); and one of whom deemed the Fed-

eral tax proceedings in question to be criminal in character (Stewart J. dissenting at pp. 460-64); in no way argues for changing the exclusionary rule, especially in view of the fact that the Court has declared both a clear rationale applicable to most searches and seizures and expressly declined to do what the Chief Justice feared. In effect, these arguments address philosophical conflicts on the Court, but in view of the recent decisions of this Court—including the two in question—they attest to the capacity and flexibility to enunciate Constitutional doctrine consistent with perceived purposes of the Fourth Amendment without being hamstrung or constricted by the presence of the exclusionary rule when it is ill advised to apply it.

Similarly, Mr. Justice White's concern that a Judge's decision to admit evidence in circumstances wherein the application of the exclusionary rule is unwarranted renders him a "participant(s) in Fourth Amendment violations." *Stone v. Powell, supra,* 428 U.S. at p. 540 (White J. dissenting), was thoroughly rebuked by this Court as easily as *United States v. Peltier, supra,* 422 U.S. at p. 536.

Chief Justice Burger in *Stone v. Powell, supra,* also asserts that the sole purpose of the exclusionary rule is "to protect innocent persons aggrieved by police misconduct." and the way to do that is to "impose direct sanctions on errant police officers or on the public treasury by way of tort actions . . . And of course, by definition the direct beneficiaries of this (exclusionary) rule can be none but persons guilty of crimes." at pp. 500-501 and Mr. Justice White also views the exclusionary rule in terms of its protection of the privacy interest of the person arrested or searched. He tells us that "The violation, if there was one, has already occurred and the evidence is at hand," and that we are frequently dealing

with police conduct which is "unintentional and faultless" and "(E)xclusion of the evidence does not cure the invasion of the defendant's rights which he has already suffered." He proceeds to explain that the victim of the search cannot maintain an action for damages against an officer "for a mistaken but good faith invasion of his privacy" so "it makes even less sense to exclude the evidence solely on his behalf." *Stone v. Powell, supra,* 428 U.S. at pp. 540-42. With all due respect, these observations—while possessed of some validity insofar as demonstrating the inability to undo all of the harm to the victim of the search whose privacy was unlawfully invaded—miss the mark because they fail to focus on the primary purpose of the exclusionary rule which is to deter Fourth Amendment violations, of the citizenry at large. W. La Fave, 1 Search, Seizure, 6 (1983 Supp.), Mertens & Wasserstrom, "The good faith exception to the exclusionary rule: Deregulating the police Derailing the law," 70 Georgetown L. J. 365, 399-401 (1981).

As mentioned previously, the core of the exclusionary rule is to protect those citizens whose rights would be violated and yet never show up in court by providing a disincentive to violate the Fourth Amendment rights of even the most culpable. The Court seems to have lost sight of the fact that the exclusionary rule is applied to cases when other than its noblest citizens are involved not to guarantee their immunity from police detection, but as the only feasible method our society has devised to guarantee the Fourth Amendment freedoms for everyone else. See e. g., *United States v. Canadra, supra* at pp. 347-48; *Mapp v. Ohio, supra* at p. 656; *Elkins v. United States, supra* at pp. 217-18; *People v. Cahan, supra* at pp. 439-448. So the fact that a person's privacy has already

been invaded, and that aspect of the harm cannot be totally corrected, misses the point. It was never contended that a citizen whose Fourth Amendment rights were violated could be restored to the pristine position where they have never been. The exclusionary rule was never envisoned as a mechanism for accomplishing that end.

As the law now stands most citizens who have had their privacy rights invaded either cannot or will not resort to the Courts. Chief Justice Burger's insistence in *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971) (Burger C. J. dissenting), that adequate alternatives be formulated and effectuated before we seek substitutions for the exclusionary rule remain valid observations despite his changed position which is largely due to the focus on the sordid details of the cases in which regretably this Court must forge Constitutional doctrine and the position which he shares with a majority of this Court that the Fourth Amendment does not dictate an across the board application of the exclusionary rule and the Court has dealt with many cases where it justifiably did not apply it.

Even if their rights have been flagrantly violated, many classes of people will never voice their objection. Many persons are afraid of the police, and if they have recently suffered at their expense, they aren't about to create a hue and cry. Also the impecunious and the industrious will rarely complain either because of the expense involved or the loss of time from work. Transients are never in one place long enough to inaugurate and litigate the predictably protracted and combative proceedings. And how about the perpetrator of "victimless crimes" or "malum prohibitum" offenses? Those who have been re-

peatedly harassed or whose privacy rights have been invaded, and yet have done no wrong or at most have committed trivial offenses causing little if any social harm will not complain. Fear of the police, embarrassment and lack of societal compassion or toleration for the victim effectively forecloses large numbers of persons. And we should bear in mind that this Court has justifiably held that everything from a detention to an arrest to a pat-down search, to a full blown search, to a booking search, etc., are protected—as they should be—under the Rubric of the Fourth Amendment. Many of these situations involve the investigation and arrest of persons for offenses without fruits and thus evidentiary suppression hearings don't occur. It is imperative, given the vulnerability of citizens to the pressures of law enforcement, that we studiously avoid adopting a rule which can be applied by any member of the judiciary—many of whom don't like the Fourth Amendment or some of the people whom it protects—in such a way so as to diminish the safeguards against police compliance with the Fourth Amendment.

The capacity of the exclusionary rule to deter Fourth Amendment violations has also been questioned. See e. g., *Illinois v. Gates, supra* (White J. concurring), 76 L. Ed. 2d at 562; *Stone v. Powell, supra,* 428 U.S. — (Burger C.J. concurring and White J. dissenting); *Bivens v. Six Unknown Narcotics Agents,* 403 U.S. 388 (1971) (Burger C.J. dissenting).

It has never been claimed that positive empirical proof of the number and extent of privacy violations deterred by the exclusionary rule could ever be demonstrated with scientific precision. However, the Courts have wisely concluded that it does serve that function. More-

over, even when states were under an injunction to enforce the core of the Fourth Amendment, *Wolf v. Colorado, supra,* police violations remained rampant until an exclusionary rule became a matter of necessity as the only method to safeguard Fourth Amendment freedoms. See *Mapp v. Ohio, supra,* and *People v. Cahan, supra.*

Furthermore, this Court's analysis in previous cases amply demonstrates why such empirical proof could never be forthcoming. It has been repeatedly stated that civil suits against officers are virtually non-existent and almost wholly without success. See e. g., *Stone v. Powell, supra* (White J. dissenting); *Bivens, supra,* at pp. 416, 420-21 (Burger C.J. dissenting). And it has been conceded that to expect the police to police the police or the District Attorney to do so in an area where it is uniformly agreed that law enforcement views its societal purpose to engage "in the often competitive enterprise of ferreting out crime". *Johnson v. United States,* 333 U.S. 10, 14 (1948), and perceives the Fourth Amendment to be a hindrance in the performance of its task, the search for the identity of innocent victims is not only futile but contradicted. See *Irvine v. California, supra,* at pp. 540-42.

The criminal courts, of necessity, never see the cases where the Fourth Amendment rights of innocents have been violated, because since the victims didn't turn out to be criminals they never show up in Court. These indisputable propositions suffice to explain why there is no ready accounting of the Fourth Amendment violations of innocents and never can be. Moreover, when the Court points out that police officers should not be suable or subject to reprimand or dismissal because of Fourth Amendment violations unless they are flagrant and devoid of good

faith for fear that we will otherwise intimidate the police in the performance of their duties, *Stone v. Powell, supra,* 428 U.S. at pp. 540-42 (White J. dissenting), it impressively reaffirms the basis for the exclusionary rule.

The fact that this Court has fashioned standing rules which exclude evidence against the party who is clearly culpable, and left standing in the dock those only marginally culpable or not culpable at all, is the strongest possible evidence for the Court's acceptance of this position. See *Rakas v. Illinois,* 439 U.S. 128 (1978); *Brown v. United States,* 411 U.S. 223 (1973); *United States v. Salvucci,* 448 U.S. 83 (1980); *Rawlings v. Kentucky,* 448 U.S. 98 (1980).

Similarly, the Court has rigorously protected the culpable, whose Fourth Amendment rights have been violated, but when the taint becomes sufficiently attenuated so that the primary illegality is purged—which really means that police officers will not be encouraged to violate the Fourth Amendment rights of our citizenry—it allows the evidence to be introduced, frequently against lesser lights. See e.g. *United States v. Ceccolini,* 435 U.S. 268 (1978); *Wong Sun v. United States,* 371 U.S. 471 (1963).

Mr. Justice White makes the following argument concerning uncertainty and conflict in the law of Search and Seizure:

> "there will be those occasions where the trial or appellate court will disagree on the issue of probable cause, no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men could easily differ on the question. It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but

in any event sufficiently to require the trial judge to hold that there was not probable cause to make the arrest and to seize the evidence offered by the prosecution. * * *

"In making constitutional judgments under the general language used in some parts of our Constitution, including the Fourth Amendment, there is much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. Surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest." *Stone v. Powell, supra,* 428 U.S. at pp. 540-41 (White J., dissenting). See also *Illinois v. Gates, supra,* 76 L. Ed. 2d at 564 (White J., concurring).

The Solicitor General makes the same argument. (Gates Br. pp. 30-35)

Additionally, it can be successfully maintained that often decisions vary from state to state, among the different Federal Circuits, the appellate courts within *one* state and the trial courts within the *same* state. These addendums to the Court's list of conflicts *appear* to provide corroboration for the Court's ultimate concern—namely how police officers (and Judges) can know the permissible limits of conduct under the Fourth Amendment. However, we will shortly explain how that argument buttresses the argument *against* the enunciation of a generalized verbal formula permitting Fourth Amendment violations so long as the police acted in the reasonable good faith belief that their conduct was in accord with the Fourteenth Amendment.

The conflicting judgments, which understandably trouble Mr. Justice White, exist in many areas of the law,

not just Constitutional law, and not only in cases involving the Fourth Amendment. And of course this Court does not routinely review *state cases*—even if they involve the loss of life or liberty—unless they present a case within the jurisdiction of this Court, usually calling for an interpretation of the United States Constitution. The rigorous constrictions of time and space forbid cataloging the decisions demonstrating these propositions here, and counsel foresees no serious dispute by anyone. We view these facts of life as supportive of the continued need for meaningful appellate examination and the continued quest to both establish rules of law and prevent the erosion of such rules, although they may be less than perfect. This point we will examine in depth shortly. But the very realization that we are dealing with the Fourth Amendment—part of the Bill of Rights—and one of the most treasured and fundamental undergirdings of our society, even if it is subject to different points of view argues strenuously for careful scrutiny before engrafting an exception to the exclusionary rule which will permit the Courts of this land to permit violations of the Fourth Amendment upon a showing of "reasonable good faith mistake" for the torrent of reasons to be discussed *infra*.

V. The Good Faith Mistake Rule, When Implemented, Will Decimate The Fourth Amendment.

This Court has declared that the laws governing searches and seizures are so complicated that the policeman cannot comprehend them. *Illinois v. Gates, supra*, 76 L. Ed. 2d at p. 564 (White J. concurring), *Stone v. Powell, supra* at pp. 539-40 (White J. dissenting), *Bivens v. Six*

Unknown Fed. Narcotics Agents, 403 U.S. 388, 417 (Burger C.J. dissenting). And he lacks the time, inclination, training and capacity to understand them. *Bivens, supra* at p. 417 (Burger C.J. dissenting). Moreover, the conflicts among reasonable minded members of the judiciary demonstrates that judges can't fathom the law either. *Illinois v. Gates, supra*, 76 L. Ed. 2d at p. 564 (White J. concurring), *Stone v. Powell, supra* at pp. 539-540 (White J. dissenting), *Bivens, supra* at p. 417 (Burger C.J. dissenting). And that magistrates who are constitutionally charged with the issuance or non-issuance of search warrants under the Fourth Amendment shouldn't even be expected to keep abreast of the law. *Illinois v. Gates, supra*, 76 L. Ed. 2d at 546 (majority opinion) at 565 n. 17 (White J. concurring).

The exclusionary rule has served for sixty-nine years to secure our citizenry their Fourth Amendment rights, see *Weeks v. United States, supra*, and after all other alternatives had failed, the States were placed under the same injunction by this Court twenty-two years ago in *Mapp v. Ohio, supra*, seven years after the States were informed that its law enforcement personnel must obey the Fourth Amendment but were not Constitutionally forbidden to use the fruits of their illegal endeavors and nevertheless continued to ignore the Fourth Amendment. *Wolf v. Colorado, supra.*

Now it is suggested that this Court replace the requirement that Judges and law enforcement personnel adhere to Fourth Amendment guarantees with a rule whereby officers may violate the Fourth Amendment and use the fruits of their violations in Court so long as they entertain a reasonable good faith belief that they were act-

ing consonant with the Fourth Amendment. *Illinois v. Gates, supra,* 76 L. Ed. 2d at pp. 562-67 (White J. concurring); *Stone v. Powell, supra,* 428 U.S. at pp. 538-42 (White J. dissenting); Gates Br. p. 25 (endorsed by the Solicitor General).

Police have traditionally been interested in the detection and prosecution of criminals not in the Fourth Amendment, probable cause or search warrants all of which they regard as nuisances inhibiting their job performance. This fact has been recognized repeatedly by the Courts and served as a basis for the exclusionary rule without which Fourth Amendment protections proved virtually non-existent. See *e.g., Weeks, Mapp, Elkins, Johnson, McDonald, Cahan, supra.*

Nevertheless, through the rule of law our courts have infused a concern in law enforcement that if they disobey the Fourth Amendment they may be unable to convict their adversary, the criminal offender. Cf. Gates Br. p. 36.

Interestingly, the exclusionary rule has had a dramatic impact on the morality of police officers, hitherto non-existent, because it has required that they receive some training at police academies, on the job and in the courtroom as to the meaning of the Fourth Amendment, and the justifications for intruding on the various interests protected by it. Also from courtroom experience the morally educative rule of law has been reinforced by having judges in search and seizure cases explain to them what the appellate courts have stated the law on the subject to be and usually why. The use of search warrants has also increased (Gates Br. p. 36).

Ironically, except in search warrant cases where officers are able to seek out the most familiar and lenient magistrate, police generally cannot predict which judge or judges will rule on the legality of their Fourth Amendment intrusions and consequently have had to pay heed to the rulings of the courts and so did their superiors who trained them.

Also, contrary to assertions of the Court and the Solicitor General, characterizing the situations wherein evidence has been suppressed as condemning police conduct as faulty or amounting to misconduct, police are routinely told what the Fourth Amendment requires and that it is the Court's duty to apply the law. When evidence is suppressed, police officers do not leave court feeling like criminals, nor do they fear that they will be subject to ridicule or civil suits except for the grossest violations of constitutional rights. They have presumably done their job as they saw it and the Court has likewise performed *its* role in the judicial process. That realization results in marginal cases and those where there have been slight transgressions of the Fourth Amendment eventuating in Court.

With these observations in mind, let us journey into a future where the lower courts have been authoritatively informed by this court that the law of the land no longer compels them, but does not even entitle them to enforce the Fourth Amendment. Their responsibility is to do so only in those cases where the police fail to show that they entertained a reasonable belief that their conduct didn't run afoul of the Fourth Amendment. *Illinois v. Gates, supra*, 76 L. Ed. 2d at pp. 562-67 (White J. concurring),

Stone v. Powell, supra, 428 U.S. at pp. 538-42 (White J. dissenting).

It is easy to prophesize the type of training which officers will receive in police academies and in the station house. Drawing from the proven lessons of the past, the objective will be how to present the case in such a fashion that judges, who sparingly employ the exclusionary rule, usually in those cases where the law appears to overwhelmingly support the defense, will find a sufficient basis to uphold the search and seizure.

There will predictably be two approaches to the education of law enforcement under the new standard, the legal and the factual—although frequently they will be intertwined. Let us first discuss the legal. Drawing sustenance from this court's statements to the effect that police can't be expected to know the law, *Illinois v. Gates, supra,* 76 L. Ed. 2d at 564 (White J. concurring); *Stone v. Powell, supra,* 425 U. S. at pp. 539-40 (White J. dissenting) and can't even learn it *Bivens, supra,* at p. 417 (Burger C. J. dissenting), plus this Court's declarations that even Judges can't agree on search and seizure law. Ibid. and that even magistrates who issue search warrants aren't expected to understand the intricacies of the law, *Illinois v. Gates, supra,* 76 L. Ed. 2d at 546 (majority opinion), at p. 565, fn 17, White, J. concurring), law enforcement agencies, either through the police department itself or in conjunction with other police departments or prosecution agencies—all with the primary dedication to successfully prosecute criminals and enforce their own value judgments on social behavior—will catalogue the legal decisions most charitable in permitting searches and seizures.

This will produce a veritable goldmine of justifications for downgrading the Fourth Amendment to its least common denominator. The State of California alone has five separate District Courts of Appeal with eleven separate divisions and a total of fifty-five appellate justices. That's restricted to appellate courts hearing felony matters and does not include the seven justices on the California Supreme Court or the various appellate departments of the Superior Court in the different counties who hear misdemeanor appeals.

Furthermore, not all judicial differences relate to confusion over the application of legal principles. There are appellate court judges in California who haven't reversed a criminal case in ten years and some who never cared for the exclusionary rule and have systematically avoided applying it by finding suspicious circumstances in nearly all police investigations and transforming every subjective appraisal of events into an objective reason for arrests and searches. Fortunately such decisions are in the minority, but few actually are reviewed by the California Supreme Court because time, manpower and the sheer bulk of cases do not permit hearing every conflict which arises in the lower courts and certainly not at the precise time such differences appear. Just as with this Court, the California Supreme Court can referee no more than a minimal percentage of lower court disputes.

We can reasonably predict that police departments will follow the dictates of the cases most supportive of their position despite whether they be in the minority or totally unpersuasive, so long as they grant virtual *carte blanche* to police officers in the performance of their jobs. Officers and law enforcement agencies will

naturally become disciples of those judges who leave them unrestrained. Thus, judges who lightly regard the Fourth Amendment and regard the exclusionary rule as a loathsome encumbrance will continue to render legal decisions which, if they represented prevailing thought, would long ago have annihilated both. And certainly the police officer who testifies that he based his search on a manual telling him what some judges have regarded as a lawful invasion of a defendant's privacy will be held to have reasonably believed his conduct was in accord with the Fourth Amendment. The search and seizure will certainly not be "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell J. concurring).

Frequently, federal courts and state courts cite each other's decisions and federal courts cite decisions from other federal courts and state courts sometimes cite cases decided by other state courts, so the capability of writing a Bible on how to defend the most niggardly interpretation of the Fourth Amendment safeguards to mere protection against activities akin to "the rack and the screw." See *Rochin v. California, supra* at p. 173.

Since the issue for the various courts under the proposed new test will no longer be implementing the Fourth Amendment, but rather determining whether the officers had a reasonable belief that their actions were in accord with it, there will be no incentive for judges to articulate Fourth Amendment doctrine. They need merely decide whether the officers reasonably believed that their conduct was consistent with the Fourth Amendment. This will undoubtedly encourage judges who have previously

been under an edict from this Court to enforce the Fourth Amendment to disavow such a commitment and legitimize intrusions of the privacy zone protected by the Fourth Amendment in all cases but the intolerable. Most judges, in order to perform their judicial duties would best keep available a digest of the cases supplied to them by the police or a local prosecuting agency for it will be unnecessary to spread the terrain of knowledge or analyze any broader.

Another reality to consider is that rarely are all cases factually identical. That does not, however, lead to the conclusion that law cannot be developed. Such a conclusion would be anathema to our Constitution, our legislation and undermine our whole system of jurisprudence. However, if we compound resort to the worst legal decisions with facts fairly similar to them plus require that judges must find flagrant abuse, bad faith or misconduct in order to enforce the Fourth Amendment, what can remain of it?

This Court is on the verge of unwittingly promulgating a fusion of the lowest common legal denominator with the lowest common factual denominator. Since trial judges ruling on motions will neither be tempted to apply nor required to apply the Fourth Amendment to search and seizure cases, what will emerge is a rule of law which basically tolerates Fourth Amendment violations except in the most extreme cases which will then present themselves as Fourth Amendment law. Outrageous police behavior will become the threshhold of Fourth Amendment invasions. Conduct short of that mark will be regarded as lawful. Thus at the police academies or in stationhouse briefings or casual discussions amongst police officers there will

develop reasonable justifications for honestly believing that conduct violative of the Fourth Amendment actually comports with it. Since lower level judicial renditions on search and seizure cases rarely are written, police oversimplification of conduct held lawful by *a* judge and passed on by scuttlebutt provides objectively reasonable justification for similar conduct. Moreover, where presently a dedicated, but not overzealous officer, can go to court with both the honest and reasonable belief that his conduct was lawful or close to it, and if not the judge will so decide without excoriating him for his behavior, under the new rule a police officer will go to court feeling that his behavior has been vindicated in advance. If he explains to the magistrate why the intrusion was justified and the magistrate accepts the reasoning, it will frequently result in the diminuation of Fourth Amendment rights. If his explanation is rejected, he will not only be confused by what he perceives as a conflict between judges on the same question, but will earnestly believe that he is being penalized for doing what the court had said was lawful.

What will be the function of appellate courts in this nightmare? Since the issue to be resolved is the officer's justification for his search based upon the lowest common denominator of judicial decision and not safeguarding Fourth Amendment rights, the appellate court's legal repertoire can also be quite limited. The Court's decision need only reflect its opinion of the officer's good faith. However, since that decision dictates what police are permitted to do under the Fourth Amendment, it will become an additional guide to the interpretation of the Fourth Amendment itself leading inevitably to further erosion of the Fourth Amendment.

Of course, under the proposed "good faith mistake" rule magistrates will also become involved to a much more measurable degree in law enforcement activities although they are supposed to remain "neutral and detached." At present, unless a judge determines that the police officer is lying to him or not correctly depicting what occurred, his task is to apply the law to the facts before him, not to judge the officer's good faith belief that his conduct was lawful under the Fourth Amendment. However, as explained above, under the good faith rule, the magistrate will be called upon to make a judgment concerning the validity of the police officer's mistaken belief that his actions were sanctioned by the Fourth Amendment and cannot rely on the rule of law to fulfill his function. In most cases he must either rubber stamp the officer's conduct or decree that it was not in good faith. As a practical matter, to suppress the evidence he will frequently have to quarrel with the officer's and the police department's reliance on law with which he disagrees and be critical of the officer's efforts to learn Fourth Amendment law or the shabbiness of the police department in instructing him in that regard. Given the close relationship between judges administering criminal laws and the police department, the onus will simply prove too great to permit the magistrate to remain neutral and detached and to exercise his independent judgment.

Furthermore, it has been suggested that a finding that the officer was not acting in good faith would condemn him to dismissal, suspension or reprimand from the police department or to a civil suit for damages. *Stone v. Powell, supra,* 428 U.S. at pp. 500-501 (Burger C.J. concurring); *Bivens v. Six Unknown Fed. Narcotics*

Agents, 403 U.S. 388, 421-424 (Burger C.J. dissenting); Gates Br. p. 64. And since no judge is going to place that albatross around the policeman's neck, except in the case of rank physical brutality, the Fourth Amendment will quietly evaporate.

To essay that the new standard will not be *subjective* good faith, *Illinois v. Gates, supra,* 76 L.Ed.2d at 563, n. 15 (White J. concurring), but requires an *objective* good faith belief that the officer's conduct comports with the Fourth Amendment fails to hurdle the insuperable obstacles which predictably will decimate not only the exclusionary rule but the Fourth Amendment itself. Let us examine several hypotheticals which surely will arise should the newly proposed rule be adopted.

(1) Officer Greenhorn testifies that this was his first arrest and search since recently graduating from the police academy. This simple unadorned statement presents a number of Fourth Amendment questions. Should his conduct be judged by the standard of the fledgling police officer as opposed to that of the veteran, a tantalizing and seemingly sensible notion? But, if so, then current Fourth Amendment law must be turned upon its head because experience and expertise have justified invasions of the zone of privacy where the absence of such background did not. And such an approach will most assuredly place a premium on ignorance and allow the tenderfoot scout to intrude where the eagle scout dare not. It will encourage, a la "silver platter," assigning the invasion having the most scanty justification to the officer least required to justify it. Moreover, what examination is appropriate for the curriculum at the police academy for after all it should be teaching

its officer candidates what constitutes lawful arrests, searches and seizures. Can the testifying officer merely recite that he received training in the area of search and seizure law? If so can the defense counsel cross-examine him on the number of hours of schooling he received and the intensity of the study? Is it appropriate for the police officer to produce a syllabus wherein he was taught that the seizure was lawful and for the defense counsel to argue that either there were other decisions more apposite to the present case or that the book was slanted toward evaluating only those decisions adopting the most stingy interpretation of the Fourth Amendment? Should legal briefs be submitted on the syllabus being questioned, or should personnel from the police academy be subpoenaed as witnesses Would it be relevant or would the result be any different if prior to the search the rookie officer had telephoned a more experienced officer, described the situation to him and was told to proceed? If so, could the more seasoned officer be called to test the accuracy of both the depiction of the grounds for the search and his advice? And if some or all of these matters were litigated before the court and it upheld the search and seizure, would it then constitute good faith for police officers who learned of the decision to emulate it based upon the rendition they were given, and of course using their own judgment to apply it to the variable factual variations which invariably arise?

(2) Sergeant Lawyer testifies that he attends law school at night and that, in his Constitutional or Criminal law class, his professor presented a hypothetical situation similar to the one in question and declared that under the law he thought it was permissible to search, or that the law was sufficiently fuzzy so that a search

was arguably permissible under the good faith standard. What value does Sergeant Lawyer's attendance of law school have in the determination of good faith—for after all he has attempted to ascertain what searches and seizures are lawful? Does his word have to be taken at face value, or may he be questioned concerning the length of his law school tenure, his grades, the book or books on which he relies, and may they and the law professor be subpoenaed to either reinforce his testimony or discredit it?

(3) Deputy Goodfaith testifies—in defense of his search and seizure—that one day while in court waiting for a case in which he was involved to be called, that he witnessed a judge rule a search lawful in circumstances almost identical to that in which he acted. May he so testify, because certainly listening to judges decide search and seizure questions is one of the best ways of schooling oneself on Fourth Amendment law? Suppose he doesn't remember the name of the judge or the time and place. Is the search justified despite the absence of meaningful cross-examination? If he does, can the judge be subpoenaed to court to testify either for or against him? Can the record of the proceedings be ordered transcribed and produced to test the genuineness of the comparison of the two situations? Or suppose Deputy Goodfaith overheard a similar situation characterized by a deputy district attorney, during a discussion with a defense counsel, as a lawful search? Is the search good? Can the D.A. and the defense counsel be subpoenaed? Suppose Goodfaith was only one of five searching officers, three of whom gave reasons why the search was based on reasonable cause and two who thought that it wasn't. If the verdict were reversed or the margin was four to one,

would that play a role in the determination of good faith, and if so what?

The whole notion of good faith as a generalized doctrine is so nebulous and incapable of fair application that it would foreseeably result in the demise of the Fourth Amendment. Hundreds of illustrations of surefire occurrences could be itemized here, but those listed above should suffice to illustrate the improvidence of such a doctrine. It is also interesting that in *none* of the Court's opinions addressing the subject of a good faith exception have even the most common situations, which can easily be envisoned as happening, been examined. No wonder that the Solicitor General and all of the parties advocating the good faith exception have shied away from even courting such an analysis and urged instead that the doctrine simply be verbally formulated by this Court and then farmed out to the numerous lower courts for "testing" and "implementation."

Is it best that these questions not be evaluated here but rather tested in the fifty state jurisdictions and the eleven federal circuits? Will we have narrowed the scope and likelihood of search and seizure hearings or haven't we expanded them? Will we really have shortened the court time necessary to decide search and seizure questions? Have we at least made it clear what types of witnesses and evidence can be offered under the proposed new rule? Have we effectively precluded examination of the officer's beliefs? Have we minimized the occasions wherein defense lawyers will clutter up the courts with matters which don't go to the issue of guilt or innocence? Haven't we created countless new issues dealing with consumption of time, conflict of interest, a

realistic undermining of judicial integrity and the rule of law, as well as a berserk, confused and inadequate basis for meaningful appellate review? Will the new rule assure that proper conduct will be encouraged and improper conduct discouraged? Have we enunciated adequate safeguards to prevent the compromise of the Fourth Amendment? Will the appellate caseload be seriously reduced under the new rule?

The Government fails to explain why the court's "make work" would be reduced under the proposed new standard; and it is clear from the novelty of the proposition being urged, its inherent complexity, the evidentiary wilderness yet to be charted—since this is to be tested in the lower courts—and counsel's obligation is to raise the issue in any event, that the number of motions will remain approximately the same, but their complexity and the length of time necessary to litigate them will increase. So once again the Government's argument does not lead to the Government's conclusion.

We do not argue that every hyothetical problem which could arise must be satisfactorily resolved by this Court before enunciating a new rule, but, regrettably, not even the most fundamental problems have been scrutinized by this Court, and the proponents of the rule have disdained doing so.

VII. Searches Pursuant To Warrant Likewise Decimates The Fourth Amendment Under A Good Faith Exception

It has been suggested that searches conducted pursuant to warrant need not be further examined for Constitutional infractions, except perhaps in outlandish sit-

uations; because once a police officer has obtained a warrant, it is purposeless to exclude the evidence procured in reliance upon that warrant since it cannot serve to deter police conduct violative of the Fourth Amendment. See e. g., *Illinois v. Gates, supra,* 76 L. Ed. 2d at 565 (White J. concurring); *Stone v. Powell, supra,* 428 U.S. 1 at 428 (Burger C.J. concurring) at 564.

This position is bottomed on a misunderstanding of the Fourth Amendment which has revolved around the doctrinal dispute over the roles of "deterrence" and "judicial integrity" as the appropriate underpinning for the exclusionary rule in enforcing Fourth Amendment guarantees. A majority of this Court, as explained earlier, has rejected the notion that a court becomes impure or a partner in crime, *ipso facto,* from the admission of evidence which is held to be violative of the Fourth Amendment. See e.g. *United States v. Peltier, supra,* 422 U.S. at pp. 537-39. *Stone v. Powell, supra,* 428 U.S. at p. 486. *United States v. Calandra, supra* at 348.

This Court is of the view that while the doctrine of judicial integrity is not totally subsumed by the doctrine of deterrence, nevertheless in the mine run of instances they run hand in hand and "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution." *United States v. Janis, supra,* at 458, n. 35 (1976).

Although the Solicitor General argues, without authority, that this Court has never articulated any "rationale for applying the exclusionary rule to suppress evidence obtained pursuant to a search warrant." (Gates Br. p. 39)—a statement subsequently adopted verbatim

again without citation of authority in *Illinois v. Gates*, 76 L. Ed. 2d at 564 (White J. concurring), the rationale has been repeatedly stated in the numerous cases applying it, namely that there are certain conditions which must be met before there can be a lawful intrusion upon interests protected by the Fourth Amendment. A review of cases, which we will shortly examine, wherein searches pursuant to warrant have been invalidated can generally be explained by the need to encourage compliance with Fourth Amendment guarantees and invoking disincentives to noncompliance. And the rationale encompasses all institutions and personnel participating in the process.

It is admittedly a critical and often decisive maxim that search warrants issued by detached and impartial magistrates are to be preferred to warrantless searches conducted by police officers "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948), and that the most conspicuous and eye-catching situations frequently involve gross Fourth Amendment violations by the police. See e.g. *McDonald v. United States, supra; Mapp v. Ohio, supra; People v. Cahan, supra.* However, the rule should not be devoured by its foremost examples.

Police who conduct searches and seizures conspicuously interract with defendants; consequently the behavior of both is highly visible and becomes the featured consideration in deciding whether a search is consonant with the Fourth Amendment. However, the magistrate neither knows the defendant nor sees him, although he interracts with the police in deciding whether to issue a warrant. And largely the choice of the magistrate selected to review

the facts in support of the warrant belongs to the officers seeking the warrant since, in the absence of his unavailability, they may choose him.

So while the deterrent effect served by the exclusionary rule, as it pertains to police officers, focuses on their activities *vis a vis* the defendant, the type of behavior which it is imperative to maintain by magistrates is the impartial review of the evidence presented by police officers and insistence that the grounds for the search warrant and the particulars of the privacy interest invaded comport with the Constitutional requirements, irrespective of the good faith of the police. *Beck v. Ohio,* 379 U.S. 89, 97 (1964).

The Fourth Amendment enforcement process via the exclusionary rule dates back to at least 1914, *Weeks v. United States, supra,* and conceivably to 1886. See *Boyd v. United States,* 116 U.S. 616. It has always entailed substantial responsibilities for the judiciary from the lowliest magistrate to the highest courts.

This Court has encouraged police officers to obtain search warrants and construed the probable cause requirements of affidavits more liberally when search warrants have been obtained. See e. g., *United States v. Ventresca,* 380 U.S. 102, 106-07 (1965), and has often stated that warrantless searches or seizures are presumptively illegal. See e. g., *McDonald v. United States, supra; Johnson v. United States, supra; Coolidge v. New Hampshire, supra.*

Nevertheless, this Court, in cases involving warrants, has consistently held that the magistrate who issues them must in fact be "neutral and detached." See e. g., *Lo-Ji*

Sales, Inc. v. New York, 442 U.S. 319 (1979); *Connally v. Georgia*, 429 U.S. 245 (1977); *Shadwick v. Tampa*, 407 U.S. 345 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

And searches and seizures must be predicated upon an affidavit which recites sufficient probable cause for the invasion of the privacy interest involved and that deficiency cannot be cured by the existence of a search warrant. See e. g., *Whitely v. Warden*, 401 U.S. 560, 564-65 (19—); *Berger v. New York*, 388 U.S. 41 (1967); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Nathanson v. United States*, 290 U.S. 41 (1933); *Jones v. United States*, 362 U.S. 257, 269 (1960).

Moreover, search warrants must spell out with particularity the place to be searched and the objects to be seized. See e. g., *Ybarra v. Illinois*, 444 U.S. 85, 92 n. 4 (1979); *Lo-Ji Sales Inc., supra; Stanford v. Texas*, 379 U.S. 479 (1965); *Marcus v. Search Warrants, etc.*, 367 U.S. 717 (1961); *Marron v. United States*, 275 U.S. 192, 196 (1927).

This Court has never doubted the need for rigorous appellate review of Fourth Amendment questions with "oversight jurisdiction" remaining in this Court. See e. g. *Stone v. Powell, supra*, 428 U.S. at 493.

Ironically, since search warrant requirements are most prevalent and exacting when the more sacred and vital privacy interests are invaded, cf. *Payton v. New York*, 445 U.S. 573 (1980); *Chapman v. United States*. 365 U.S. 610, 613 (1960); *Arguello v. United States*, 269 U.S. 20 (1965), with *United States v. Ross*, 456 U.S. 798 (1982); *United States v. Chadwick*, 443 U.S. 1 (1977) and the potential for seeking out magistrates most likely to issue search warrants poses a constant peril to the

Fourth Amendment, absent appellate scrutiny, the wisdom of requiring adherence to the requirements established by this Court and other higher courts is arguably even more imperative in search warrant cases.

In Los Angeles County it is routine for police to seek out judges who will virtually rubber stamp their affidavits in quest of search warrants and do so swiftly. The same handful of judges sign hundreds of warrants weekly while they are on the bench listening to testimony in other cases. Virtually any regular practitioner in the criminal law field, whether he be a prosecutor or a defense counsel, if he is being candid—would confirm this theme and has frequently witnessed it in operation. Unfortunately, for those engaged in the litigation—either slightly interrupted or not interrupted at all, or who are seated in court waiting for their cases to be heard, they don't know which warrants are being signed at the time and, needless to say, have no advanced knowledge that they may end up as counsel contesting the search conducted under the warrant.

In *United States v. Karathanos*, 531 F. 2d 26, 33-34 (2d Cir. 1976), cert. den. 428 U.S. 910 (1976), the Court stated:

> "(T)he exclusionary rule (has the) effect of making . . . (magistrates) aware that their decision to issue a search warrant is a matter of importance . . . in regard to the success of any subsequent criminal prosecution. (It) may well induce them to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires. . . . (Also) the present universal application of the exclusionary rule . . . gives law enforcement officers no . . . incentive to seek out the most lenient magistrates."

For fitting reminders of the need for careful judicial checks that constitutional guarantees of privacy and the sanctity of individual rights be preserved which on paper are every bit as nobly phrased as our own, see the portraits of Nazi German law and current Soviet law (Petitioner's Brief in *Sheppard*, Appendix "A", Liacos J. concurring at pp. 25-26).

> "If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665, 756 (1970). See also Dellinger, Of rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1562-1563 (1972).

The Solicitor General maintains that "strict adherence to the (exclusionary) rule is both unnecessary and unwise because suitable and efficacious substitute remedies, less costly to society, are available, at least in the federal system. A United States Magistrate, unlike a law enforcement officer, is subject to the control and direc-

tion of the district court and may be removed by the court for 'incompetency, misconduct, neglect of duty, or physical or mental disability.' . . . If it appears that a particular magistrate is serving merely as a 'rubber stamp' or has demonstrated an inability to exercise mature judgment, a remedy is available that is far more direct and effective, and less costly to the criminal justice system, than the suppression of evidence in a later proceeding." (Gates Br. p. 43, n. 23).

Preliminarily, the search warrant here was *not* issued by a federal magistrate subject to the listed controls. Instead, the case was deliberately abducted from the California courts into the federal district court and beyond the review of the issuing magistrate with the stated purpose preventing him from exercising his responsibilities under the California statutes, Cal. Pen. Code section 1538.5 (b), and decisions governing the implementation of the Fourth Amendment (App. Opening Br. pp. 6-18, 34-40, Sept. 19th R.T. 17-20, 97-102). In addition, the Solicitor General fails to cite even *one* instance in *any* federal court in *history* where a magistrate has been dismissed from office (nor even reprimanded) due to the unjustified issuance of a search warrant. From this observation we may draw one of three conclusions: (1) There has never been a magistrate who wasn't neutral and detached, independent and objective, and who failed to exercise mature judgment—a proposition too naive to deserve further comment; or (2) the camaraderie between the United States magistrates and judges is so profound that a magistrate's violations of a defendant's constitutional rights has been systematically ignored—hopefully not the case, but if so it presents another argument against the "good

faith mistake" exception; or (3) it doesn't follow that if a magistrate grants a search warrant without an adequate basis for the Fourth Amendment invasion which the warrant permits, that he is incompetent, guilty of misconduct or physically or mentally disabled.

The last position is obviously correct. To even suggest, as does the Solicitor General, that the sanction of dismissal from office is the appropriate mechanism for securing compliance with Fourth Amendment guarantees, demonstrates just how little he understands about the historic and functional role of the magistrate in issuing search warrants which intrude upon Fourth Amendment privacy rights. What is crucial is that the magistrate, as well as the police, obey Fourth Amendment standards governing the protections of our privacy interests and that those standards be subject to appellate review and the rule of law. The purpose is to vindicate and preserve the Fourth Amendment, not discharge from office a magistrate who issues a search warrant unsupported by reasonable or probable cause. To propose a rule, which in essence holds that the test of whether a person's Fourth Amendment privacy rights have been violated is whether the circumstances attending the violation warrant the discharge of the issuing magistrate from office, or render the police officer liable in civil damages or subject to punitive sanctions, unfairly penalizes both the judges and officers and reduces the Fourth Amendment to a sham, because nobody is going to exact such a ridiculous and unjust tribute. Thus, as explained earlier, the Fourth Amendment will swiftly evolve into, at most, a protection against conduct akin to "the rack and the screw" or which "shocks the conscience of the court", see *Rochin v. Cal-*

ifornia, supra, at pp. 172-73, and even then, be limited to those few cases where the plaintiffs are logistically and economically in a position to protest.

In summary, most of the impediments to implementation of Fourth Amendment guarantees under the proposed "good faith mistake" rule apply in the cases of warrants and some additional ones are fostered. The need for a rule of law and judicial review of decisions are essential barricades against the erosion of the Constitutional guarantee to be free from unreasonable searches and seizures. And since police officers can seek out any magistrate, which means that absent time pressure they will choose the most lenient, the chances of a detached and neutral decision by a magistrate is gravely diminished, given the institutional focus on the use of decisions and interpretations of decisions affording the police the widest latitude in invading the privacy of our people. And this Court has even told the magistrate who issues a search warrant that it is too much for him to remain abreast of the law on probable cause. *Illinois v. Gates, supra,* 76 L. Ed. 2d at 546 (majority opinion), at p. 565, n. 17 (White J. concurring). Add to that the substitution of good faith belief in Fourth Amendment compliance for conduct not violative of the Fourth Amendment, compounded by interpretations most favorable to the police and finally the capacity of police officers to seek out a different magistrate if the first one isn't disposed to issue a warrant, and little will be left of the Fourth Amendment—especially in warrant cases.

VII. The Good Faith Mistake Rule Will Annihilate The Most Sensitive Of First And Fourth Amendment Rights.

A topic which has received no consideration whatsoever by those advocating a good faith exception to the exclusionary rule in cases where the police officer reasonably believes that he was acting lawfully under the Fourth Amendment is the enforcement of statutes and ordinances where First Amendment values are frequently involved. And this activity is almost totally within the bailiwick of local constables and police officials.

For example, laws governing disturbance or breach of the peace, trespass, unlawful assembly, failure to disperse, riot, obstruction of streets, sidewalks or the flow of traffic and unlawful picketing are amongst the foremost illustrations of state laws historically utilized to infringe upon the various cognate guarantees of the First Amendment to the Constitution. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 559 (1965) (two opinions); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Fields v. South Carolina*, 375 U.S. 44 (19); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

The same can be said of various licensing or permit requirements requisite to participating in lawful marches, parades, assemblies or to petition for a redress of grievances. See, e.g., *Kunz v. New York*, 340 U.S. 290, 304 (1961); *Niemotko v. Maryland*, 340 U.S. 268 (1951); Saia *v. New York*, 334 U.S. 558 (1948); *Largent v. Texas*, 318 U.S. 418 (19); *Hague v. CIO*, 307 U.S. 496 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938).

Historically, this Court as well as the lower courts, has had its hands full trying to distinguish between constitutionally protected activities and those properly subject to prevention, regulation, control or arrest. The Court's disagreements in this area of Constitutional doctrine have been at least as vehement and dependent as much upon differing judicial philosophies and factual nuances as those complained of in the area of search and seizure law. See, e. g., *Brown v. Louisiana, supra; Cox v. Louisiana, supra; Edwards v. South Carolina, supra; Lombard v. Louisiana,* 373 U.S. 267 (1963); *Peterson v. City of Greenville,* 373 U.S. 244 (1963); *Garner v. Louisiana, supra;* and then compare them with *Adderley v. Florida,* 385 U.S. 39 (1966).

Radical differences on First Amendment issues have permeated this Court and often one vote made the difference between upholding a criminal conviction and upsetting it. That tiny disparity resulted in this Court upholding by a five to four margin in *Walker v. City of Birmingham,* 388 U.S. 307 (1967), reh. den. 88 S.Ct. 12 (1967) the criminal contempt conviction of the Reverend Martin Luther King, despite the fact that his legal advisors didn't see the need of engaging in the futile exercise of challenging the *ex parte* injunction obtained by the City of Birmingham at the behest of Public Safety Commissioner, Bull Connor, who gained notoriety for unleashing police dogs and training fire hoses on "niggers" and who had already emphatically stated that no permit to protest segregation of the churches in Birmingham would be issued. When Dr. King and others peacefully marched, they were arrested, sentenced to jail and fined for contempt of Court. Subsequently, Dr. King received the Nobel Peace Price and his

birthday was made a national holiday. His decision to defy the biased Court's tyrannical edict certainly played a prominent role in the rationale for such tributes. He refused to be the "good German."

This Court has invalidated laws which constituted prior restraints on Constitutionally lawful activity. See, e. g., *Near v. Minnesota*, 283 U.S. 697 (1937); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1947); *Time's Film Corp. v. City of Chicago*, 365 U.S. 43, 50 (1961) (Warren C. J. dissenting); Cf. *Freedman v. Maryland*, 380 U.S. 57 (1968). See also *Cox v. Louisiana, supra*, at pp. 557-58 (1965); and required standards to be articulated in cases where First Amendment freedoms were threatened by licensing or permit requirements. See, e. g., *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Hague v. CIO, supra.*

It has also struck down statutes or ordinances on such grounds as vagueness and overbreadth on their face or as applied. See, e. g., *Cox v. Louisiana, supra; Edwards v. South Carolina, supra; Stromberg v. California*, 283 U. S. 359, 369 (1931); *Sara v. New York, supra* (1948); *Niemilke v. Maryland, supra.*

One difficulty confronted by our courts has been the tendency of the police or public officials to try and hinder, prevent or render ineffective, ideas and behavior which they personally do not endorse and often abhorred. See, e. g., *Cox v. Louisiana, supra*, at pp. 556-558; *Schneider v. State, supra*, at 164; *Hague v. CIO, supra; Sara v. New York, supra; Niemotko v. Maryland, supra.* In these cases, those same persons acclimated to carrying out the will of the majority of their constituents and whose ability to remain in judicial or administrative office depended upon

it, have proved reluctant to permit unfashionable First Amendment behavior and have rigorously enforced vague laws against unpopular persons or groups, as well as against the economically and socially declasse. Ibid.

Today most states retain a sizeable arsenal of statutes, which while not sufficiently nebulous to be declared unconstitutional, nevertheless employ language skillfully designed to permit police officers, prosecutors and judges latitude in interpretation and implementation. See e. g., Cal. Pen. Code section 415 forbidding in general language a disturbance of the peace and section 407 denouncing as an unlawful assemply two persons doing "a lawful act in a violent, boisterous or tumultuous manner. . . ."

And time, manner, duration and circumstances surrounding protected behavior still provide adequate justifications for restricting lawful activities, either before they happen or as a means to terminate the conduct and arrest those involved. *Cox v. Louisiana, supra* at 569, 574; *Cox v. New Hampshire,* 312 U.S. 569 (1941); *Poulos v. New Hampshire,* 345 U.S. 395 (1953). Under the proposed good faith mistake rule it appears that all of the decisions which have so carefully forged upon the anvil of experience to protect unwarranted restrictions of our basic liberties are imperiled and Mr. Justice White so warns us. See *Illinois v. Gates, supra,* 76 L. Ed. at 560, n. 12.

The overwhelming majority of investigations and invasions of privacy by detentions, arrests and searches and seizures are conducted by local police officials enforcing either state or local law. *Abbate v. United States,* 359 U.S. 187 (1955); *Jerome v. United States,* 318 U.S. 101; *Screws v. United States,* 325 U.S. 91, 109.

As previously explained, the intrusions violative of the Fourth Amendment encompass the detention or seizure of the person, a limited or patdown search for weapons, his arrest, searches incident to the arrest, as well as comprehensive searches of the person, his home or office, his papers and effects, automobile, etc. See *Florida v. Royer, supra; United States v. Mendenhall, supra; Terry v. Ohio, supra.*

Inasmuch as detentions, seizures of persons, arrests and jailings are core Fourth Amendment intrusions, irrespective of whether evidence is obtained as a byproduct of these police activities, the failure to do more than harass a citizen or prevent his lawful behavior or even if there be subsequent dismissals of unwarranted charges or findings of not guilty in cases where the grounds for arrest and the grounds for convictions are frequently identical, the results are an unrestorable loss of Fourth Amendment guarantees as well as First Amendment rights. In some cases, placards, pamphlets, T shirts and "dirty books" might be seized, but physical evidence is not usually the gravamen of the injury in these situations. At most, it would magnify the harm already done.

Under the proposed "good faith mistake" rule, statutes which by their very nature can't be defined with exactitude and precision, can be interpreted with facility by police as warranting an arrest, and the legitimacy of the arrest will be subject to routine ratification by a judge should the issue arise. There will be no real prospect that law enforcement behavior will be declared illegal or censured and this prospect will not be minimized but measurably increased if civil remedies are created, either in the form of damages against the police officer, the entity

which employs him, or administrative penalties are invoked such as dismissal, suspension, or loss of pay because, given the laws which call for judgments in applying legal language to varying fact situations coupled with the good faith mistake rule, judges will not wish to invalidate an arrest or search for fear that it states a compelling case for aggravation, criticism and economic harm for the police officer.

Moreover, given this Court's recent decisions permitting comprehensive searches in cases of "custodial arrests" which have been construed to cover such plebeian frailties as driving without a license in one's possession. *Gustafson v. Florida*, 414 U.S. 260 (1973); cf. *Michigan v. DeFillipo, supra*, at pp. 435-36, police officers can operate almost free of restraint to make dragnet arrests and searches of persons in "high crime areas," in cases of possible "curfew violations", and at public gatherings where it is probable in contemporary society that *some* of the persons possess marijuana or other drugs.

One need only the most limited imagination to appreciate what a boon to police officers and public officials who seek to violate the First and Fourth Amendment Rights of the "weirdos," "undesirables," and "dissidents," the good faith mistake rule will prove to be. Since a police officer will no longer have to worry about conforming to a rule of law, but simply express a reasonable belief that his intrusions were lawful in an area with very few cut and dried rules, he will once again be repatriated to the happy hunting grounds, from which he was evicted by the Constitution and the exclusionary rule formulated by this Court to protect the Fourth Amendment, and to which he has long yearned to return. And even the most con-

scientious judges can no longer sturdily resist the renewed expeditions into privacy and freedom to be secure from unreasonable searches and seizures because the officer is salvaged by the lowest common denominator of behavior which will shortly become his prescribed standard for obedience. Furthermore, in the class of cases we have been discussing and the areas where the laws complained of are enforced, Judges—many of whom would like to see the offended parties run out of town on a rail—or who are at best inhospitable to the defendant's claims to Constitutional protection, will welcome the comfort this Court generates by removing the haunting moral suasion of the rule of law and substituting in its place a fancified version of the "good ol' boy" rationale for validating Constitutional violations.

Two other anti-social results will predictably resurface or increase in the wake of the proposed new rule: The chilling effect see *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *Speiser v. Randall*, 357 U.S. 513 (1958), on anyone who experiences, sees or hears about the intrusions upon the privacy of our citizens will make all but the most daring, fearful of lawfully exercising their rights and of interaction with the police. For those concerned about chilling lawful behavior, it should bring no solace that police officers will have a virtually limitless facility to stop, detain and search persons who use our public thoroughfares either on foot or in vehicles, bringing to Court only those Fourth Amendment violations which produce evidence of criminal behavior. That occurs now to a far greater degree thon most persons realize, but the proposed new rule will become tantamount to authorizing roving *intra*national checkpoint searches not founded upon probable cause. The second

negative effect will be the diminished likelihood of civil redress, or even public complaint, because the lowered standard with which the police must comply seriously reduces the chances of recovering damages, although the person has been wronged. Moreover, it simultaneously magnifies the likelihood that Fourth Amendment violations will remain invisible because it intensifies the anxiety concerning renewed harrassment or arrest as well as exacerbates the tensions which already exist between the citizen and his police force.

The final irony is that those who champion the cause to create an atmosphere conducive to aggrieved parties recouping at least a measure of redemption of their lost privacy are the primary architects of the rule which will both facilitate its further invasion and reduce the potential for even partial recompense.

VIII. The Abduction Of The Case By The Federal Prosecutor From The State Courts After Arrest And Searches Had Been Conducted Solely By State Police Officers And The Defense Was Preparing To Attack The Search Warrant Before The State Magistrate Who Issued It And Whom The State Of California Had Commissioned By Statute To Hear The Matter, Amounted To Bad Faith, Hardly Justifying Reliance On The Proposed Good Faith Exception To The Exclusionary Rule

The investigation in this case was conducted exclusively by peace officers of the Tulare County Sheriff's Department in conjunction with law enforcement personnel of the State of California. No federal officers were involved. The warrants were issued by a competent qualified state magistrate based on affidavits from the state police, and the searches were conducted solely by state

law enforcement. The defendants were then arraigned in state court on state charges and a preliminary hearing was scheduled with the defendants ready to litigate the validity of the searches before the magistrate who issued the warrants, as provided by California law (Cal. Pen. Code §1538.5). At that juncture the federal prosecutor unilaterally telephoned the Visalia County District Attorney's office and told him to drop the charges, that he was going to prosecute the defendants. His reason for doing so was due to the more stringent penalties in federal court and the fear that the state magistrate might not uphold the searches. Thus, arguments that the affidavit was insufficient to support the warrant or that material misstatements or omissions convinced the magistrate that the warrant should not have issued were removed from state review. All of these matters were litigated at the trial level and on appeal. (See Appellants' Op. Br. on Appeal, pp. 6-18, 34-40; September 29th R.T. 17-20, 97-102; December 8th R.T. 2-7).

Earlier we examined the decisions of *Elkins v. United States*, 364 U.S. 206 (1960) and *Mapp v. Ohio*, 367 U.S. 643 (1961) in terms of their extending and clarifying the sanctions against unreasonable searches and seizures.

In order to understand what *Elkins, supra,* and *Mapp, supra,* did do, it is necessary to first understand what they did not do. In holding that federal Constitutional standards must be obeyed by state law enforcement officials, they did not hold that what the state legislature, its courts and its law enforcement personnel—including both police and prosecutors—do to implement Fourth Amendment guarantees is irrelevant to the Fourth

Amendment or to federal review. To the contrary, this Court in *Ker v. California, supra,* acknowledged section 995 of the California Penal Code as a procedural device for enforcement of Fourth Amendment rights and this Court has consistently held that state law governs the validity of arrests so long as it doesn't conflict with the Fourth Amendment. See e.g. *Michigan v. DeFillipo, supra,* at 36; *Ker v. California, supra,* at 37; *Johnson v. United States,* 333 U.S. 10, 15 (1948). This Court never set itself up as a legislative body to enact laws defining the circumstances and criteria of arrest, rules regarding custody, substantive and procedural implementation of Fourth Amendment requirements, etc. That would have been both an unprecedented and unwieldy chore. And Congress has not determined that law enforcement in the area of drugs and narcotics is pre-empted by the Supremacy clause.

It remained the states burden, given that almost all crimes are state crimes enforced by state trained personnel obeying state statutes set up to govern their conduct, to pass legislation and establish the tools, which in light of their appreciation of local conditions, were deemed most suitable to the enforcement of the Fourth Amendment. "The states under our federal system have the principal responsibility for defining and prosecuting crimes." See *Screws v. United States,* 325 U.S. 91, 109; *Jerome v. United States,* 318 U.S. 101; *Abbate v. United States,* 359 U.S. 187 (1955).

If a state passes a statute such as "stop and frisk" or a "murder exception" to the emergency circumstances doctrine, or any other such rule, it must pass the scrutiny of the Fourth Amendment. See e. g., *Sibron v. New York,* 392 U.S. 40 (1968); *Mincey v. Arizona,* 437 U.S. 385 (1978). However, it does not follow that if the spe-

cific enactment is not written by this Court or the Federal Congress that there are not Fourth Amendment overtones or that certain types of non-compliance are not violations of the Fourth Amendment bringing into play the exclusionary rule.

The fallacy attending virtually every case considered in this area is the assumption that if the specific legislative result or judicial decision is not *compelled by the Federal Constitution* it remains aloof from Constitutional edict immune from Constitutional review and constitutes *simply* an independent state ground.

The quantum leap previously engaged in by many courts, has been from the proposition that because the state legal tools employed for enforcing Fourth and Fourteenth Amendment rights can be designed, changed and even abrogated by the states, that it followed that those devices therefore were not of federal constitutional significance.

One way of demonstrating that this view is incorrect is simply to assume that a state established no judicial procedures whatsoever for enforcing the Fourth Amendment. This Court would not be called upon to specify what state laws must be enacted, but would certainly conclude that the state courts must be sufficiently outfitted to protect Fourth Amendment Rights. After all *Stone v. Powell, supra,* totally depends upon that hypothesis.

So while this Court sits, in a Fourth Amendment Constitutional sense, only to scrutinize the choreography of state legislation giving meaningful effect to the Amendments, striking down actions violative of them and affirming actions which comply with them, it doesn't follow

that state law designed to implement the Fourth and Fourteenth Amendments is not of Constitutional dimensions or can be run over roughshod by an officer of the federal government.

In *Ker v. California, supra,* the first case to give body to the meaning of the exclusionary rule in the implementation of search and seizure by state law enforcement officers, all nine Justices of this Court were agreed on one proposition and that was that the State had the right and obligation to safeguard the guarantees of the Fourteenth Amendment and eight Justices agreed that the State had the duty to safeguard the Fourth Amendment transmitted to the States by virtue of the Fourteenth Amendment. Nobody quarreled with the California methodology in providing the rules for testing the search and seizure laws. No one suggested that since it was not of Constitutional origin that the statute passed by the California legislature to do that, and to implement California Constitutional guarantees, should be examined to determine whether it was *compelled* by the United States Constitution, which of course it wasn't. A majority of this Court has also accepted the proposition that given the fact that most crimes are state crimes enforced by state law enforcement officers, that an arrest must be in compliance with state law to satisfy the Fourth Amendment. See *Michigan v. DeFillipo, supra.* So why should this Court commit itself to encouraging state law enforcement officers who are bred on state law, to circumvent that law if invited to do so by a federal official, as in this case, to avoid effectuating the comprehensive legislation California has established to implement the Federal Constitution?

It cannot be maintained that a state law, legislative or decisional, which seeks to implement Fourth Amendment guarantees can be flyswatted into non-application simply because an assistant United States Attorney wants to depreciate California law and yank the case into Federal Court.

It is necessary to repeat that this is not an area where Congress has attempted successfully or unsuccessfully to enact pre-emptive legislation so that the Supremacy clause would exclude the States from acting. It is a case where the investigation was carried out exclusively by state law enforcement, leading to the arrests of all of the petitioners under state laws by state law enforcement personnel and subsequently charges were filed against them in the correct state court under California law, with a statute calling for their search and seizure claims to be litigated in front of the magistrate who issued the warrant under California state law implementing the Federal Constitution. Calif. Pen. Code § 1538.5(b).

In this case the State of California is not even a party which can protect its own jurisdictional rights and laws governing its public servants because the State has been removed as a party by the decision of one man, a deputy United States Attorney, and by virtue of his decision California law has succumbed and the State has lost its right to govern its own law enforcement agents.

If this Court scrutinizes state criminal procedure to maintain minimal due process standards, shouldn't it also see that federal courts help rather than hinder state efforts to bring State law enforcement up to higher standards? If restraining federal officers from unconstitu-

tional activity is important enough to cause federal courts to exclude some relevant evidence, surely State court efforts to control State law enforcement officers are important enough to our system of federalism to merit similar treatment. Parsons, "State-Federal Crossfire in Search and Seizure and Self-Incrimination", 42 Cornell L. Q. 346, 362-63 (1957).

State prosecution also comports with our federal system and the concept of comity. In *Younger v. Harris*, 401 U.S. 46, 91 S.Ct. 746, 750-51 (1971), this Court defined the term as:

> "(P)roper respect for State functions, recognition of the fact that the entire country is made up of a Union of separate State governments, and a continuance of the belief that the National Government will fair best if the States and their institutions are left free to perform their separate functions in their separate ways . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors in ways that will not unduly interfere with the legitimate activities of the State."

In *Patterson v. New York*, — U.S. —, 97 S.Ct. 2319, 2322 (1977) this Court declared:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the federal government, (citation), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States."

California has a clear and present sovereign political interest in prosecuting alleged violations of its criminal

law as well as in regulating law enforcement conduct within its borders. Under the circumstances presented by this case, federal prosecution constitutes a substantial curtailment of California's ability to enforce its own penal laws and to regulate the conduct of its police. Clearly this action by the Assistant United States Attorney does not demonstrate sensitivity to California's legitimate interest in these essential State functions.

The principle which the Government seeks to vindicate today is that an Assistant United States Attorney should have the awesome power to eradicate laws passed by the states to control their law enforcement personnel by simply making one phone call and instructing the state prosecutor to drop the charges and by so doing transfigure California law. But it is even worse because not only is the government contending that this is permissible, but that this activity can be justified in the name of "good faith." If deliberately avoiding the state magistrate's statutorily prescribed review and replacing him by a judge in a different forum not familiar with the circumstances of the issuance of the search warrant and who stated that he didn't have to obey state law is an example of "good faith," it is difficult to conceive of prosecutional bad faith.

CONCLUSION

For the aforegoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

C. Luke McKissack

Counsel for Respondents.

NASATIR, SHERMAN & HIRSCH
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LOS ANGELES, CALIFORNIA 90035
TELEPHONE (213) 277-3112

MICHAEL D. NASATIR
VICTOR SHERMAN
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PAUL L. GABBERT
JANET SCHMIDT SHERMAN

A9 9 Jan 6 Conf

November 16, 1983

93-24

Francis J. Lorson
Chief Deputy Clerk
U.S. SUPREME COURT
Washington, D.C. 20543

Re: United States v. Charles Tate, et al.

Dear Mr. Lorson:

Please be advised that a brief has been prepared on behalf of Charles Tate, Roosevelt Montgomery and Ezeal Reeves in the above-entitled matter. The brief was prepared by Luke McKissack on behalf of Charles Tate and Roosevelt Montgomery and by myself on behalf of Ezeal Reeves. Mr. Capozzi and Mr. Whitney have requested that they be permitted to join in on behalf of their respective clients. Mr. McKissack and I have no objection to this procedure.

Thank you for your cooperation in this matter.

Very truly yours,

NASATIR, SHERMAN & HIRSCH

Victor Sherman

VICTOR SHERMAN

VS:jh

cc: Anthony P. Capozzi, Esq.
David Whitney, Esq.
The Hon. Rex E. Lee, Solicitor General

NASATIR, SHERMAN & HIRSCH
A PROFESSIONAL LAW CORPORATION
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MICHAEL D. NASATIR
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JANET SCHMIDT SHERMAN

November 23, 1983

Francis J. Lorson
Chief Deputy Clerk
United States Supreme Court
Washington, D.C. 20543

Re: U.S. v. Charles Tate, et al.,
Case No. 83-24

Dear Mr. Lorson:

This will confirm our conversation of the other day wherein I informed you that Attorney Luke McKissack has assumed full responsibility for filing a Reply Brief on behalf of all of the defendants in the above-entitled matter. Mr. McKissack assured me prior to the 18th of November that he would have the brief timely filed. Mr. McKissack has all of the records in this case and therefore I am unable to take any action myself. In addition, the various defendants have agreed that Mr. McKissack would file the brief on behalf of each of them in one consolidated document.

I apologize for Mr. McKissack's failure to file the brief timely but I understand that he will definitely have it filed no later than November 30, 1983. Unfortunately, the matter is entirely out of my hands at this time. I hope the Court understands that due to Mr. McKissack's continuous representations to me that the brief was being timely prepared and the defendants desire that Mr. McKissack prepare the brief personally that I have had no control over the situation.

Your kind attention in this matter is greatly appreciated.

Very truly yours,

VICTOR SHERMAN

VS/kw
cc: The Honorable Rex E. Lee
Solicitor General

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

November 9, 1983

Victor Sherman, Esq.
Nasatir, Sherman, Hirsch & Re
9911 W. Pico Boulevard
Suite 1000
Los Angeles, CA 90035

RE: United States v. Charles Tate, et al.
83-24

Dear Mr. Sherman:

Your request of October 4, 1983 for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted, and your time has been extended to and including November 18, 1983.

No request for a further extension of time will be entertained by the Clerk.

Very truly yours,

ALEXANDER L. STEVAS, CLERK

By

Francis J. Lorson
Chief Deputy Clerk

cdd
cc: Anthony P. Capozzi, Esq.
The Honorable Rex E. Lee, Solicitor General
David Whitney, Esq.

NASATIR, SHERMAN, HIRSCH & RÉ
A PROFESSIONAL LAW CORPORATION
9911 W. PICO BOULEVARD, SUITE 1000
LOS ANGELES, CALIFORNIA 90035

MICHAEL D. NASATIR
VICTOR SHERMAN
RICHARD G. HIRSCH
MICHAELINE ABATE RÉ
PAUL L. GABBERT
ROBERT J. WATERS
ROBERT J. BARTH

October 4, 1983

The Honorable Alexander L. Stevas
Clerk, Supreme Court of the United States
Washington, D.C. 20543

Re: United States v. Charles Tate, et al.,
Case No. 83-24

Dear Mr. Stevas:

The petition for a writ of certiorari in this case was filed on July 8, 1983, and served upon this office. A response to the petition is due on October 19, 1983. I am hereby requesting under Rule 29.3 of the Rules of this Court, an extension of time to and including November 18, 1983, within which to file the response.

This request for an extension of time is necessary because the attorney preparing the response is currently involved in a three-week trial in the case of United States v. Siegel, Case No. CR 83-552-MML, Central District of California, and will be unable to spend time on this matter until said trial is completed.

Sincerely,

VICTOR SHERMAN, ESQ.

cc: Anthony P. Capozzi, Esq.
David Whitney, Esq.
Rex E. Lee, Solicitor General

11/9/83 Motion Granted. Time for filing response to petition for writ of certiorari extended to 11/18/83

No further ext, clk.

LAW OFFICES
ANTHONY P. CAPOZZI
616 "P" STREET
FRESNO, CALIFORNIA 93721

ROBERT A. GIOVACCHINI

(209) 264-5000

October 26, 1983

The Honorable Alexander L. Stevas
Clerk, Supreme Court of the United States
Washington, D.C. 20543

Re: U.S.A. vs. Charles Tate, et al.
Case No. 83-24

Dear Mr. Stevas:

Pursuant to a telephone conversation with your office on October 26, 1983, I was informed that I need not file a separate brief in opposition to the petition for a writ of certiorari so long as I join in the response of Charles Tate, who is represented by Mr. Victor Sherman.

Mr. Sherman is agreeable to my joining in his response. Please consider this letter as a request to join in the response filed by Mr. Sherman.

Your cooperation is deeply appreciated.

Yours very truly,

Anthony P. Capozzi

Anthony P. Capozzi

APC:jlr

cc Norman Sweeney
David Whitney, Esq.
Victor Sherman, Esq.
Rex E. Lee, Solicitor General

DAVID WHITNEY
Attorney at Law
444 North Arrowhead, Suite 204
San Bernardino, California 92401
(714) 882-7766

October 13, 1983

The Honorable Alexander L. Stevas
Clerk, Supreme Court of the United States
Washington, D.C. 20543

Re: United States v. Charles Tate, et al.,
Case No. 83-24

Dear Mr. Stevas:

After receiving your letter dated September 27, 1983 my secretary telephoned your office and was informed that I need not file a response so long as it was made clear in Mr. Sherman's response that my client, Charles Tate, was included therein. We have received Mr. Sherman's permission to join in his pleadings and have been assured that he will make this clear in his reply to the petition.

Also, please note that I have resumed the practice of law with offices located at the above new address.

Thank you.

Sincerely,

DAVID WHITNEY

DW:mgw

cc: Victor Sherman, Esq.
Anthony Capozzi, Esq.
Rex E. Lee, Solicitor General

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

October 11, 1983

Anthony P. Capozzi, Esq.
616 P Street
Fresno, California 93721

RE: United States v. Charles Tate, et al.
No. 83-24

Dear Mr. Capozzi:

Your request of October 4, 1983 for an extension of time within which to file a brief in opposition to the petition for a writ of certiorari in the above-entitled case has been granted, and your time has been extended to and including November 3, 1983.

No request for a further extension of time will be entertained by the Clerk.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

gtb
cc: Hon. Rex E. Lee, Solicitor General

Counsel of record

LAW OFFICES
ANTHONY P. CAPOZZI
616 "P" STREET
FRESNO, CALIFORNIA 93721

ROBERT A. GIOVACCHINI

(209) 264-5000

October 4, 1983

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Attention: Francis J. Lorson
Chief Deputy Clerk

Re: United States vs. Charles Tate, et al.
No. 83-24

Dear Mr. Lorson:

I am the attorney for Norman Sweeney, Defendant/Respondent in the above-captioned matter. I have been requested by the Office of the Clerk of the Supreme Court of the United States to file a response to the Government's Petition for Writ of Certiorari on or before October 19, 1983. I hereby request a 15 day extension of time to file and serve a responsive pleading to the Government's Writ of Certiorari for the following reasons:

1. I am required to file appellee's response brief in the matter of United States vs. Robert Murray, United States Court of Appeals, Ninth Circuit, No. 83-1155, on October 7, 1983.

2. I am required to argue before the Appellate Court of the State of California, Fifth District, on October 18, 1983, in the matter of Mike Demirjian Trucking Service, Inc. vs. United Vakk, Inc., et al., case number 5 Civil F002614.

3. I am presently scheduled for a court trial in the matter of Vahan Chamlian vs. Mike Demirjian, et al., Fresno County Superior Court Case No. 241992-7, on November 1, 1983.

Based on my calendar set forth above, I request an extension of time in which to serve and file a responsive pleading to and including November 3, 1983.

10/7/83 Francis J. Lorson
11/3/83
No further ext, etc.

If you have any questions with regard to this matter, please do not hesitate to call.

Yours very truly,

LAW OFFICES OF ANTHONY P. CAPOZZI

Anthony P. Capozzi

APC:jlr

Enclosure (1 envelope)

cc Victor Sherman, Esq.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

September 28, 1983

Luke McKissack, Esquire
9911 W. Pico Blvd.
Suite 1000
Los Angeles, California 90035

Re: United States v. Charles Tate, et al.
No. 83-24

Dear Mr. McKissack:

By letter dated August 18, 1983, the time for you to file a response to the above-entitled petition for a writ of certiorari was extended to and including September 13, 1983 in order that the Court could consider the case at its September 26th Conference. You further advised pursuant to a telephone conversation with this office on September 19, 1983 that your response was at the printer and it would be filed forthwith.

As of this writing no such response has been received. By return mail, kindly advise this office of the status of your response in order that the Court may be advised why the response was not filed on or before September 13, 1983.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

th

cc: Hon. Rex E. Lee

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

September 27, 1983

Anthony P. Capozzi, Esquire
616 P Street
Fresno, California 93721

Victor Sherman, Esquire
9911 W. Pico Boulevard
Suite 1000
Los Angeles, California 90035

David Whitney, Esquire
Star Route Box 89
Forest Falls, California 92339

Re: United States v. Charles Tate, et al.
No. 83-24

Gentlemen:

The above-entitled petition for a writ of certiorari was filed in this Court on July 8, 1983 and our records indicate that copies of the petition were served upon you. The Court has directed this office to call for responses to the petition.

Forty printed copies of your responses, together with proof of service thereof, should reach this office on or before October 19, 1983.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

th

cc: Hon. Rex E. Lee

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

August 18, 1983

Luke McKissack, Esq.
9911 W. Pico Boulevard
Suite 1000
Los Angeles, California 90035

Re: United States v. Charles Tate, et al.
No. 83-24

Dear Mr. McKissack:

Your letter of recent date requesting an extension of time within which to file a response to the petition for a writ of certiorari in the above case has been received.

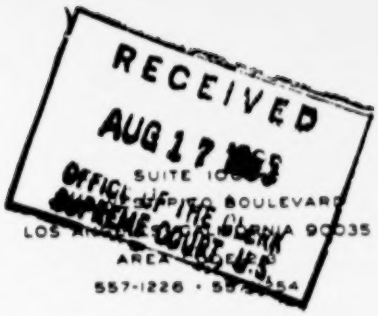
This case is already scheduled to be considered at the Court's Conference during the week of September 26, 1983. Accordingly, if you wish to have the Court consider your brief in opposition, it should reach this office no later than September 13, 1983. I therefore extend your time to and including that date.

Very truly yours,

Alexander L. Stevas
Clerk

cc: The Hon. Rex E. Lee
Solicitor General of the U. S.
Department of Justice
Washington, D. C. 20530

LAW OFFICES
LUKE MCKISSACK



Re: United States of America v. Tate, et al. (No. 83-24)

Clerk, United States Supreme Court:

I am a member of the bar of this Court and am simultaneously with this letter filing my appearance on behalf of Respondents Charles Tate and Roosevelt Montgomery(one of four co-respondents). In the pre-trial and trial matters of this case each of the five defendants-respondents had their own counsel. Similarly on appeal. I have been principally responsible for writing thelegal arguments as well as giving the oral argument before the Ninth Circuit Court of Appeals. I have been asked by all Respondents and their counsel to handle the chore of responding to the Petition for Certiorari filed by the Solicitor General on July 8, 1983 and personally brought to my attention upon returning to California on July 18, 1983. In this case the five respondents prevailed in the Court of Appeals and on the Petition for Rehearing wherein I filed a response on behalf of them all. The Solicitor General applied for andreceived a thirty day extension within which to file his Petition for Certiorari with this Court. I am making a similar request on behalf of the Respondents herein.

After the filing of the Petition for Certiorari by the Solicitor General and upon my return to California it took a few days to contact everyone with regard the responsibility of responding to the Petition. It was finally agreed that I would handle the matter in the United States Supreme Court. Upon an examination of the Petition for Certiorari I learned that three other cases, namely Colorado v. Quintero(82-1711), Massachusetts v. Sheppard(82-963) and United States v. Leon(82-1771) were being cited by the Solicitor General as for instances wherein ceriorari had been granted(on June 27, 1983 in each instance) dealing with the precise question being raised in this case, to wit a proposed good faith exception to the exclusionary rule. I then contacted the docket clerk for the Solicitor General and made arrangements to obtain a copy of the Leon case where the Government was a party and then contacted this Court as to the other two cases--which are State cases and arranged to have transmitted to me the three Petitions

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AREA CODE 213
557-1226 • 557-1254

for Certiorari. This was subsequently done and I have had them for only one week. I have been working assiduously on a response but have not had time to complete one, much less had time to arrange for it to be printed.

I have discussed this matter with Mr. Frey of the Solicitor General's office and he told me that I could inform you that the Solicitor General had no objection to granting an extension of time within which to allow a response to the Petition for Certiorari. He further pointed out that the position of the Solicitor General is that our case should await the results of the briefing and oral argument in the cases wherein ceriorari has already been granted and that no conceivable inconvenience could result from a delayed reply on our part.

For the reasons stated I do hereby request a thirty day extension within which to file a response to the Petition for Certiorari in the above case.

Respectfully submitted,

Luke McKissack

Luke McKissack
Attorney for Respondents

cc. Solicitor General of the United States